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EXAMINING AND REVIEWING THE PROCEDURES THAT WERE TAKEN BY THE OFFICE OF THE U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA IN THEIR IMPLEMENTATION OF A CONTEMPT CITATION THAT WAS VOTED BY THE FULL HOUSE OF REPRESENTATIVES AGAINST THE THEN ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ANNE GORSUCH BURFORD

(98-50)

HEARING

BEFORE THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

JUNE 16, 1983

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THURSDAY, JUNE 16, 1983

House of Representatives,
Committee on Public Works and Transportation,
Washington, DC.

The committee met, pursuant to call, at 10:25 a.m., in room 2167, Rayburn House Office Building, Hon. James J. Howard (chairman) presiding.

Present: Representatives Howard, Albosta, Anderson, Bosco, Clinger, Daub, de Lugo, Donnelly, Johnson, Levitas, Martin, Molinari, Moody, Oberstar, Petri, Rowland, Smith, Snyder, Stangeland, Sundquist, Wise, Wolf, and Young.

The Chairman. The Committee on Public Works and Transportation will come to order.

The committee is meeting today to investigate the status of the contempt citation that was voted against Environmental Protection Agency Administrator, Anne Gorsuch Burford, by the House of Representatives on December 17, 1982.

The citation, H.R. 632, was certified on December 17 by the Speaker of the House to Stanley S. Harris, the U.S. attorney for the District of Columbia.

It was certified to the U.S. attorney because the U.S. Code places responsibility for prosecuting for the Government in the Office of the U.S. attorney.

A second provision of the law, section 194 of title 2 of the United States Code, specifically addresses the question of a "certification of failure to testify; grand jury action."

Let me read this section of the law:

> Whenever a witness summoned as mentioned in Section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any com-

> mittee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Let me repeat that. The final phrase is "whose duty it shall be to bring the matter before the grand jury for its action."

That sentence does not say "shall consider bringing" or "may bring." It says "shall bring the matter before the grand jury."

Tomorrow will mark the 6-month anniversary of the Speaker's certification of the contempt citation to the U.S. attorney. To our knowledge, this matter has not been presented to the grand jury, nor are we aware of any plans of the U.S. attorney to perform his required statutory duties.

It is our responsibility to find out why the law has been ignored by the U.S. attorney. We have a responsibility for this committee, for the Congress, and for future Congresses, to have this issue settled right now.

I want to make sure everyone involved knows this is not a matter of personalities. This is a matter of the rights and duties of the Congress. If this situation is not corrected, it will be futile for any Congress to ever vote a contempt citation against an administration official at any time in the future.

I hope we can separate the personalities involved from the question of the law.

In fact, the Subcommittee on Investigations and Oversight, which originated the contempt citation, has reported a second resolution requesting a purging of the contempt and I expect to have this second resolution considered shortly by the full committee.

But we have an even larger question before us today. The question of the rights of the Congress, the duties of the U.S. attorney, and the ability of Congress to use the criminal contempt citation to enforce requests on executive branch officials are all part of this matter.

Without resolving these problems, there will be no means for Congress to compel executive branch officials to comply with subpoenas.

If the Department of Justice's position is that the U.S. attorney does not have a duty to proceed to the grand jury and that the Congress is powerless to enforce its subpoenas, then we are faced with serious questions concerning possible impeachable offenses not only by the U.S. attorney, but also by any Justice Department official who may have instructed or suggested to the U.S. attorney that he ignore the law.

For the administration, let me say we are not making idle threats. They may want to drop the matter, but we don't intend to let it drop until it is resolved and the constitutional powers of the Congress—an equal branch of government—are affirmed.

We are aware of the U.S. attorney's December 27 letter to the Speaker in which he suggests it would be inappropriate for him to consider bringing this matter before a grand jury until the civil action filed by the Department of Justice against the House of Representatives on December 16 was resolved.

Well, that matter was resolved 4½ months ago in favor of the House and still no action has been taken by the U.S. attorney. The Speaker has sent two letters asking for action and still no action was taken by the U.S. attorney.

The simple, obvious question is why? Why has the U.S. attorney continued to defy the will of the Congress, the requests from the Speaker of the House and the clear, plain language in the statutes?

Why does he think he has the right to decide how and when Congress will be permitted to take legal action against the executive branch?

The statute is clear. The directions of the Congress were clear, but they were ignored. It will be up to Mr. Harris to explain to us today why and how he made that decision.

At this time I would like to recognize any members who wish to make an opening statement.

The gentleman from Georgia.

Mr. LEVITAS. Thank you, Mr. Chairman.

First of all, I want to thank you for making these hearings available to clarify a matter of serious constitutional concern. The subpoena which led to the contempt of Congress citation, as we all recall, was issued by the subcommittee which I have the honor to chair.

The events that flowed therefrom drove this entire republic into a constitutional confrontation of proportions that had not existed since the founding of the Nation.

One of the issues that was at the heart of this confrontation was the constitutional power of the Congress to discharge its oversight function and to have full access to information.

When that information was refused, the Congress, the House of Representatives, acted under the congressional contempt statute which has been in place for over a hundred years because, without the power to compel production of information, the power to conduct oversight does not exist; and yet, we found not only was a civil action brought speciously attempting to prevent this house from proceeding as provided by law but, furthermore, the U.S. attorney for the District of Columbia—to whom the contempt was certified—elected not to present the matter to the grand jury as provided in the statute, again effectively preventing the Congress from discharging its oversight function, because, without the process to compel, the process to obtain information did not exist.

And so that leaves us at a very difficult point in our constitutional process. We have the responsibility, the right, the power to investigate, to get information, yet through the decisions of one individual—presumably one individual—we are as an institution denied that opportunity. There is another requirement that is written into the Constitution, article II. It says that the President—by that the executive branch—shall take care to faithfully execute the laws.

"Shall take care to faithfully execute the laws." Not the laws they want to execute, those they like, but to execute the laws. That is one of the highest, if not the highest responsibility of the President and the executive branch under the Constitution.

In my judgment in this case, in this matter, on at least two occasions, the executive branch did not take care faithfully to execute the law but indeed flaunted the law.

Nothing, in my judgment, could be more serious. It was for that reason, Mr. Chairman, on several occasions I raised the question on the floor of the House that the Judiciary Committee should investigate for purposes of ascertaining whether impeachable offenses had occurred. Therefore, your hearings today, Mr. Chairman, are extremely pertinent.

I want to say one last thing. The chairman is absolutely correct. This is not a matter of personalities. It is not a matter of whether we like or dislike, agree or disagree with Stanley S. Harris, individual, or with William French Smith, individual.

We are talking about one of the most fundamental, constitutional issues at stake in our Government, and that is the power of the Congress to get information, to use process, to compel that information being made available and to make that process effective by having the laws which have been on the books for over a hundred years enforced.

That is what is at stake here, Mr. Chairman. I look forward to the hearings today in the context of seeking information, getting answers because this is a precedent-setting event. I think it is important just as every event in this entire process over the last 6 to 8 months has set new precedents and broken new ground not only in the substance of the investigation, but also in the constitutional relationship between the Congress and the executive branch.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Any other members seek recognition?

Mr. MOLINARI. I have a short statement.

The CHAIRMAN. The gentleman from New York, Mr. Molinari.

Mr. MOLINARI. Mr. chairman, first, I want to thank you for moving this matter along. We have had many considerations about where this was. I appreciate the cooperation you have extended to myself and others in bringing the matter before the full committee.

In retrospect, one thing I think we can observe is that but for the confrontation that took place, we would not have had the access that we do have today and we would not have been able to proceed with the work that is going on by our subcommittee, and if you read through all the testimony and the statements prepared by Mr. Harris and others, one thing becomes clear.

That is, that we should not have had this confrontation. There was no reason for it. It was a bad mistake on those who made that judgment, and, indeed, you see that people in the administration and Mrs. Gorsuch Burford herself wanted to reveal those documents.

So we lost a great deal of important time and I think it is important now that we do establish the precedent hopefully to avoid these conflicts in the future and a spirit of cooperation and get this thing beyond us so we can go on to more important work.

Thank you very much.

The CHAIRMAN. I thank the gentleman for his statement. I agree with everything he said except for the last couple of words: "go on with more important work."

I don't know if there will be anything more important than this issue. I agree with him wholeheartedly. This could all have been avoided.

The first witness is Mr. Stanley Brand.

Mr. Brand, would you please stand up and raise your right hand?

[Witness sworn.]

The CHAIRMAN. Mr. Brand, if you would please inform the committee as to the position you hold and also inform the committee as to the procedure in this matter from the beginning and then we would like also to have your views as to what you feel the constitutional duties of various individuals involved should be or should have been.

Please proceed.

TESTIMONY OF STANLEY M. BRAND, GENERAL COUNSEL TO THE CLERK OF THE HOUSE OF REPRESENTATIVES

Mr. BRAND. Thank you, Mr. Chairman. I think, as everyone recalls, I was——

The CHAIRMAN. For the record, please tell your position.

Mr. BRAND. General Counsel to the Clerk of the House of Representatives.

As I think you will recall, I was responsible for rendering legal advice to the committee with respect to the insurance of its subpoena and the subsequent lawsuit, proceedings, and negotiations which ensued.

The statutory scheme enacted by Congress as a means of compulsion for subpoenas has been used hundreds of times since 1857, as Chairman Levitas pointed out. It was not until the late hours of December 16, 1982, however, that a serious challenge to its viability was raised by the Department. Rather than proceed under the statute as it had done hundreds of times in the past through the U.S. attorney, it filed an unprecedented suit alleging that the law was unconstitutional, could never be invoked against any executive official, and seeking the declaratory and injunctive relief against the House of Representatives.

As everyone knows by now, the suit was dismissed by motion of the House of Representatives and shortly thereafter, pursuant to negotiations, full access to the documents was obtained.

However, because of the Department's position in the suit and in the public statements it made during the pendency of the suit, questions have been raised about the viability of the law which Congress passed in 1857.

I am convinced that the statute is a good statute and is alive and well. Nothing in the Department's brief or in its civil suits or submissions to the House Judiciary Committee on this issue convinced me that it is not. Reduced to simply dimensions, I think the Department's position was, like the boy who came to the game with a ball, he didn't like the rules, and goes home with the ball during the game. That is not a perfect metaphor, but I think it illustrates the point.

The ball in this case is the prosecutorial discretion they say they have to—vested in the U.S. attorney—to refuse to go forward. The other players are the Congress and the courts. They invoke prosecutorial discretion and go home.

Congress sits by on the sidelines, frustrated, in a way totally frustrated in their ability to obtain a judicial resolution.

But, let's look at the law in the cases and see why that position is not supportable.

The concept on which they rely and, quickly reviewing Mr. Harris' prepared statement of prosecutorial discretion is well known. It permits a prosecutor to determine generally which cases to bring, how to wring them, and whether particular facts warrant prosecution given the policies and reasons advanced by the law.

This much no one disputes. Where we depart is its relevance to the statute at issue. In our view, the Department and the U.S. attorney did not exercise any prosecutorial discretion as we know it; rather, they boldly stated that they would never under any circumstances and for any reason bring a prosecution. This is not discretion.

This is recalcitrance, which shades perilously close to obstruction. But the statute provides not in any way that impinges on prosecutorial discretion that the matter shall merely be presented to the grand jury and it does not otherwise circumscribe the discretion that all prosecutors have in bringing cases.

As we know from the cases and the sources of—other sources of authority, the U.S. attorney is merely an adviser to the grand jury. As stated in one original case:

> What is the place of the U.S. attorney in the functioning of the grand jury? You must naturally accord him the respect due an officer of the government, but you do not forget he is, from the viewpoint of the grand jury, only a lawyer, an agent of the Federal Department of Justice, and by law he is only the legal adviser to the grand jury.

As Judge Smith stated in describing the statute's provisions in the lawsuit, after certification the U.S. attorney is "then required to bring the matter before the grand jury."

And under the statutory scheme, it is to the judiciary that Congress has delegated responsibility to protect it from contumacious witnesses. I notice in the U.S. attorney's prepared statement that he indicates the legislative history reflects Congress felt obliged to transfer contempt adjudications to the executive branch.

I must respectfully disagree.

I have with me the legislative history of the 1857 statute, and Congressman Marshall states the intent:

> If it is the sense of the House that sufficient authority for the purposes does not now reside in the House of Congress, then let the bill invoke the aid of the judiciary.

The Supreme Court has picked up on that legislative history and has continually sounded the note that it is conscious intent to enlist the aid of the judiciary in prosecuting contumacious conduct. This is a quote from the *United States* v. *Russell* at 1962 U.S. Supreme Court Case:

> When Congress provided that no one could be prosecuted under 2 U.S.C. 192 except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry.

In that Congress enlists the aid of the judiciary to enforce its subpoenas and the grand jury is clearly more an arm of the courts to the extent that it is a part of any branch; the Department's refusal is a refusal to permit the Congress to invoke judicial process which commences when the House votes to certify the matter to the U.S. attorney.

Finally, there are no prior examples of the Department construing the statute in this manner. Indeed, we have the opposite.

Faced with purportedly perjurious statements by executive officials before the Congress, trial of which might require disclosure of certain national security information, the Department has sua sponte, and without a vote for certification, invoked a statute against CIA Director Helms and Attorney General Kleindienst, both unusual exercises of discretion, to say the least, given the total absence of any vote or certification by the House of Representatives.

These cases are indistinguishable from this one. For Mr. Helms, like the contemptor here, was under instructions not to release the information relating to national security from the President.

In conclusion, I submit that the prosecutorial discretion waived about in this case was a high-sounding euphemism for recalcitrance, a smoke screen to distract us from the Department's decision in this matter to place the mere assertion of a claim of privilege above the responsibility to enforce a valid law hundreds of times.

I again had an opportunity to peruse the U.S. attorney's statement and I would make only one other point. The U.S. attorney discusses that the words of the statute are that he shall present the matter to the grand jury and that "shall" has been interpreted in other statutory frameworks to be an admonition, not a mandatory requirement.

It has also been interpreted to be a mandatory requirement in cases, including the famous impoundment cases with which this committee was no doubt familiar.

In the Nixon administration, the Department took the position on a number of—in a number of instances that when Congress said that the Executive shall appropriate money, it didn't mean "shall," it meant "may."

The courts resoundingly rejected that proposition, said when Congress mandated that the money be spent, that that language imposed a duty upon the executive branch.

I would also point out that in Mr. Harris' statement he says he is not free to discuss the merits of the Burford contempt matter but that illustratively the grand jury would be entitled to know that she was following the instructions of the President of the United States in conducting herself as she did.

I am not sure that they would. Reading the cases, that is not an element of the offense. Clearly the statute requires willful—an element of the statute is willfulness. The willfulness that is required though is not necessarily a state of mind which borders on evil intent to refuse to comply. It is that the willfulness is not to present yourself and testify or produce documents as the case may be. That might be an issue for the jury, and her instructions from the President might be an issue for the jury to consider in determining whether the elements of the offense have been established.

I am unaware of any instance in which that kind of defense has been presented to the grand jury in making out a case under the statute.

The one example we have, I think, is the *Tobin* case, which is an early case in this circuit involving the New York Port Authority director. He raised executive privilege in a court proceeding that was a matter that the court dealt with at trial, and so I would like to put that on the record as well.

That concludes my statement.

The **Chairman**. Thank you, Mr. Brand.

Just a few questions.

This, in a way, is a legal matter; also a constitutional matter. Many of us are not attorneys on this committee, nor in the House of Representatives.

Mr. **Brand**. That is a good thing.

The **Chairman**. We may sometimes get confused, but about an effort to say as you referred to and will be referring to, that the word "shall" may mean something else, this is the English language.

"Whose duty it shall be," to me means that that is mandatory. Would you think that in this case that is mandatory?

Mr. **Brand**. I think that is the absolute—the position we took in the lawsuit and here before the committee is that the Congress meant "shall" without getting into the separate question of what prosecutorial discretion a prosecutor might otherwise have with respect to bringing a case.

The **Chairman**. In this situation the U.S. attorney brought this to the grand jury, which is what we are talking about now.

As to any innocence or guilt or possibility of it, that decision would be made by a grand jury as to whether or not to indict that person; is that what—is that what happened?

Mr. **Brand**. I am not sure the grand jury would determine guilt or innocence.

The **Chairman**. To get to that point?

Mr. **Brand**. Yes. The legislative history—and I haven't been able to dig out the reference, I can supply it for the record; there is a reference to the fact that the House is referring the matter to the citizens of the grand jury, in effect.

The **Chairman**. That is right.

Mr. **Brand**. To put it before them for their consideration. They obviously have to have someone walk in the grand jury room to do that, and that is something that logically and consistently with article II falls to the U.S. attorney.

The **Chairman**. Again, no decision is made on that unless the grand jury decides that.

Mr. **Brand**. That is right.

The **Chairman**. What I am trying to get at is that even though all these decisions are going to be made beyond the U.S. attorney to fairly resolve that issue for that person, if the U.S. attorney doesn't just bring it to the grand jury, then nothing can happen?

Therefore, it is just one-sided? If a person would happen to be guilty, you are never going to be able to get a determination of guilt unless it goes through these steps, the first step being merely that.

Would you say in this case the U.S. attorney, after the House of Representatives, the Congress of the United States, votes a contempt citation, it is certified by the Speaker, that the position of the U.S. attorney is something like a temporary gent of the House of Representatives, a vehicle to get this determination of contempt by the Congress to the grand jury, and that is about all there is in there?

Mr. **Brand**. Certainly if you read the supreme court's language about enlisting the aid of the judiciary, that could be an interpretation you could place on his role.

The **Chairman**. We have heard a great deal about cooperation in this effort and cooperate for any kind of papers and anything that the administration may have said, which did come about. Did any of that cooperation on giving the papers come about before the suit that was filed by the administration against the Congress was thrown out, or did the cooperation come afterward?

Mr. **Brand**. I think I am the wrong person to address myself to cooperation on that issue. I represented the House in the lawsuit. I don't think that it is cooperative when on the penultimate moments when you are considering on the floor of the House a vote of contempt that lawyers in the executive branch are busy writing a complaint while those proceedings are going on and while the chairman has opened the door and said he would be willing to negotiate up to the vote and beyond the vote, in fact, preparing their papers to sue the U.S. House, the Speaker, the chairman, and the chairman of the subcommittee.

So, to that extent——

The **Chairman**. I will cover over on that.

For the benefit of the members of the committee, we got off the track. Let me restate what we are talking about and what Mr. Brand is talking about is cooperation in attempting to avoid having the contempt citation brought before the House of Representatives.

Mr. **Brand**. We certainly had that.

The **Chairman**. There were meetings there and we attempted to work out conditions under which we would either not bring the contempt to the floor of the House or even during the debate at any time before the vote be able to withdraw that contempt citation.

We were told all the way through that debate that an agreement that had been worked out with the Republican leadership in the House and the Republican leadership on this committee and the gentleman from Georgia and myself were working out, we were being told all through that debate it was being looked at and might be considered.

Then at the last minute we didn't hear anything and the contempt citation was voted and within moments, I believe, a suit was filed, a counter suit was filed.

No, I was talking about the cooperation after that, during the period pending that suit about the cooperation. Did that cooperation start after the court threw out the administration case, or did not hear, or dismissed, I guess the word is, that case?

Mr. **Brand**. There were no negotiations.

The CHAIRMAN. In between that time?

Mr. BRAND. In between——

Mr. MOLINARI. Would you yield?

In order to make sure we have an accurate record, there was a very, very brief period of cooperation prior to the contempt citation being considered, and that was a meeting on October 1, 1982, when the Deputy Commissioner, Mr. Hernandez, met with Mr. Levitas and myself and several others.

At that day we had reached a specific understanding that all documents were going to be revealed to us under certain conditions.

I must say it was observed for all of about 72 hours and then suddenly the blinds were drawn again.

I think in order to create a proper record, we should make note of that.

The CHAIRMAN. That is a very good point.

So, just to clear it, you would state that the U.S. attorney would have no personal option after the certification from the Speaker of the House?

Mr. BRAND. At least as to presentations to the grand jury.

The CHAIRMAN. I mean to bring it to them?

Mr. BRAND. Yes.

The CHAIRMAN. The gentleman from Kentucky.

Mr. SNYDER. On that note, the language of the statute says—you have it in front of you, haven't you, Stanley?

Mr. BRAND. I think I know it by heart.

Mr. SNYDER. "It shall be the duty of the Speaker of the House to certify," et cetera. Then it goes on and says, "whose duty it shall be to bring the matter before the grand jury."

So the language in regard to the obligation of the Speaker is almost identical or really is identical as far as the words "shall be" is concerned as it is to the obligation of the U.S. attorney. Is that a correct observation?

Mr. BRAND. I think on its face that is correct. There is a judicial gloss, however, on the Speaker's—in a case called *United States* v. *Wilson*.

Mr. SNYDER. I believe it is *Wilson* v. *United States*. Is that 369 F. 2d. 198?

Mr. BRAND. Right. In that case what happened was that the House was out of session.

Mr. SNYDER. That is correct.

Mr. BRAND. The statute provides that in a recess, the Speaker shall stand in the shoes of the House for purposes of determining whether to vote or certify.

Mr. SNYDER. The Speaker shall stand in the shoes of the House.

Mr. BRAND. In that case——

Mr. SNYDER. Under this statute shall submit it. What did the court say "shall" meant then?

Mr. BRAND. The court decided that he labored under a misapprehension when he certified under the impression that he had no discretion not to.

Mr. SNYDER. So they said in that case "shall" for the Speaker meant he had discretion?

Mr. BRAND. That is right. Because in their view, the Speaker, like the House and the Speaker standing in the shoes of the House, had no discretion once—insofar as he was performing a duty that would normally be performed by the House.

I don't think that case is apposite for several reasons. One is that it is clear after a vote that the Speaker has no discretion. It is only——

Mr. **Snyder**. It is in the statute?

Mr. **Brand**. It is the same statute.

Mr. **Snyder**. I don't want you to misunderstand me. I don't agree with the way Mr. Harris handled this proceeding. In the same fashion, I would not agree that the Speaker acted appropriately after a vote not to go ahead and do what the statute says, obviously. I do have some problem with the chairman's insistence in his line of questioning that "shall" always is mandatory legally.

I wish it were that clear so that we would know what the court was going to do, and if it said "shall" that it would always be mandatory, and "may" would not always be mandatory.

The point I am trying to make, Stanley, is that "shall" is not always mandatory legally. In regard to the use of "shall" in this same statute, the obligation of the Speaker, it was determined in the *Wilson* case by a 2-to-1 vote to be a matter of discretion on his part. Is that not a fair observation, not knowing whether you necessarily would agree, but it is a fair observation?

Mr. **Brand**. I concede that *Wilson* v. *United States* stands for that proposition. I think it is inapposite for the reasons I gave.

Mr. **Snyder**. You would rather have the other side of the case, but there is a legal argument, is that not correct?

Mr. **Brand**. No. I don't think there is a legal argument. It is in circumstances——

Mr. **Snyder**. I bet you Mr. Harris is saying he thinks there is.

Mr. **Brand**. I bet he does. In fact, I have seen that case cited ad nauseam, not in his papers, but in some of the things the Department submitted to the Judiciary Committee.

Where Congress indicates that "shall" doesn't mean "shall"; in this case, we have no such indication. We have the pretty strong legislative history that Congress wanted the courts to take over this matter of protecting itself from contumacious conduct.

I would submit if it does provide the kind of discretion that was provided in this case, then Congress needs to change the law, because what they are in is a like it or lump it situation where the House votes and has to rely on the positive use of the U.S. attorney's discretion or permit its processes to go unenforced.

Mr. **Snyder**. On your side of the thing, I think there is no better dictum than the *Frankfield* case that I saw in the digest CRS prepared. In the case of "shall" with regard to the U.S. attorney, it is mandatory, but it is a better dictum, I believe.

Mr. **Brand**. Since *Wilson* comes after *Frankfield,* I am not sure how good *Frankfield* is anymore.

Mr. **Snyder**. Of course, it is a differential according to your interpretations?

Mr. **Brand**. Yes; Congress puts many glosses on the same word.

Mr. **Snyder**. Assuming for the sake of argument that you are correct in your interpretation of 194, that it is mandatory and this lapse of time went on after the lawsuit was dismissed, what were your options?

Mr. **Brand**. I am not sure I had any.

Mr. **Snyder**. Well, if it is mandatory, let me ask you potentially this: Did you have the option of filing a mandamus suit against the U.S. attorney?

Mr. **Brand**. That was brought up to me and considered. I guess our theory of defense in the civil lawsuit was that we were not in court properly or timely, that it was not right for us to be in on a declaratory judgment action prior to the bringing of the——

The **Chairman**. If I may interrupt for a moment to clear something up. You attorneys are getting way beyond me in many ways.

Mr. **Snyder**. I am not enough to hurt.

The **Chairman**. When you speak about what he might do, mandamus suit, are you talking about Mr. Brand?

Mr. **Snyder**. Yes.

The **Chairman**. Or the Clerk's Office, or the Congress, or the House of Representatives? How would that come about? Would that be voted by the House is what I mean.

Mr. **Snyder**. I would defer to Mr. Brand's advice as to how it would be initiated, whether or not it would take a resolution of the House to direct him to do that, or whether he could do it on his own. I do not know the answer to that. I don't know whether he has researched it or not. It wouldn't make a lot of difference.

I am just asking if, in fact, his interpretation is correct that it is mandatory language whether or not he, as our counsel, had that option. If he had to have a vote of the House, all he had to do was ask for it.

Mr. **Brand**. I think that is a fair statement. I would not have asked for it; and beyond that, I didn't think I had the authority to do that on my own. I thought Congress had spoken unequivocally under 194. That was the means it had chosen to enforce its subpoenas and far be it from me to change the law on my own motion.

As to the actual use of mandamus, as I indicated, I think it would have been somewhat inconsistent and inappropriate to say at the time that we were stating to the court that this action was premature and that the court had no jurisdiction to take it, that we could say to the courts "You can't consider their action, because their action is barred by all kinds of jurisdictional and jurisprudential reasons, but you can take mine in the nature of a mandamus."

Mr. **Snyder**. Are you not saying with that argument, Stanley, that in fact the U.S. attorney did have discretion as to when?

Mr. **Brand**. There is nothing in the statute that indicates otherwise.

Mr. **Snyder**. So you are conceding that portion of his argument, as I went over his statement here today, as the two items, whether to do it and when to do it? You are conceding——

Mr. **Brand**. I think he does. I don't think the Congress intended or needs to circumscribe him that tightly, even if it could. I will say these cases are not like IBM antitrust cases. They are pretty simple. They don't take all that much to make out a case, at least before the grand jury. So I think while there is some implied admonition that he will bring it in a timely fashion, I would not argue that he has no discretion as to timing.

In fact, when I read his letter on December 27 to the Speaker, I thought he might even be indicating that that was really his position, that he control timing. He was not forever foreclosed from bringing an action, but at the present time he was exercising his option not to.

On the mandamus, I think it is clear that you can mandamus an executive official to perform ministerial duties. That is a pretty common doctrine in the law; and it could be argued that the presentation is such a ministerial duty. But, as I think Mr. Harris will concede and even state in his remarks, there are judgments that are made even in connection with merely presenting a matter to the grand jury in terms of whether you call witneses and who those witnesses might be or whether you just walk into the grand jury room and lay it on the table and say, "There it is."

Mr. **Levitas**. Will the gentleman yield?

Mr. **Snyder**. Sure.

Mr. **Levitas**. The question of mandamus, at the time the question arose, there was pending, as I recall, the civil action in which the Justice Department was asserting that this procedure was unconstitutional and that they were not going to bring the lawsuit.

But making reference, Mr. Brand, if you would, to the letter of the U.S. attorney to the Speaker, dated December 27, 1982, the last sentence in the first paragraph on page 2—for the benefit of the members, that is attached as an exhibit to the statement of Mr. Harris.

It says "Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy."

Taking that sentence, would not that indicate that at least from the perspective of the U.S. attorney that the disposition of the civil action would determine what course of action should be followed within the judicial context thereafter?

Mr. **Brand**. I would agree with that.

Mr. **Levitas**. And that, therefore, assuming the suit were resolved in favor of the House of Representatives, that would be a judicial resolution of the controversy? The controversy being that the House of Representatives' intention that the prosecution or the matter be presented to the grand jury should go forward.

Now my question is: Following the resolution of the pending civil action, the then pending civil action, resulting in a dismissal of it, it is correct, isn't it, that thereafter the U.S. attorney still did not present the matter to the grand jury?

Mr. **Brand**. That is right. As I read his statement, he says he was waiting for the appeal time to run.

Mr. **Levitas**. Thank you.

Mr. **Snyder**. Which ran out April 4, or thereabouts?

Mr. **Brand**. It has long since passed.

Mr. **Snyder**. I was just attempting to perhaps make the point with you that maybe you were hesitant in proceeding to push him because of some apprehension on your part that maybe his legal interpretation of the statute had some substantial basis in fact and might be upheld?

Mr. **Brand**. I think I proceeded from a more fundamental position than that. That is that we have over time been admonished to enact a civil statute to resolve these and various other means. I don't believe that those alternatives are in the interests of the House.

Mr. SNYDER. What would be the option——

Mr. BRAND. Mandamus included among them. I think that you can buy a lot of litigation and keep me busy for 2 years and sit there and get no papers. We all know how lawyers are. They can string litigation out pretty good. I consider myself an expert at it, when I am on the defense side. I think I could keep a civil suit going and a mandamus suit going for 2 or 3 years before I ever got what I would call a final judgment.

In the meantime, this committee would have been sitting here without any papers. I don't think that kind——

Mr. SNYDER. I assume that your determination that he did have discretion as to when would have precluded you from asking the Judiciary Committee to begin any kind of impeachment hearings?

Mr. BRAND. I certainly view beyond my bailiwick to suggest that the Judiciary Committee commence impeachment procedures.

Mr. SNYDER. It was an option?

Mr. BRAND. It is an option. It is a cumbersome and, as you well know, quite involved and complicated option. It certainly is one that is provided by the Constitution.

I think 2 United States Code 194 is a somewhat better way to resolve these.

Mr. SNYDER. I yield, Mr. Chairman.

The CHAIRMAN. Mr. Brand, you feel that the U.S. attorney had an obligation to bring this to the grand jury after it was passed and certified?

Mr. BRAND. That is my view.

The CHAIRMAN. Do you feel the U.S. attorney has an obligation today to bring it to the grand jury?

Mr. BRAND. Well, I don't want to lawyer you, Mr. Chairman, but——

The CHAIRMAN. Please don't.

Mr. BRAND [continuing.] There is a statement in his remarks, in the U.S. attorney's remarks, that this case is moot.

The CHAIRMAN. That is it. What we are apparently getting to is this. That we may be in a situation where the Congress votes a contempt citation, starts a procedure which then goes to the U.S. attorney and any U.S. attorney for any reason at all or for no reason at all may decide to just ignore it, and he has no obligation whatever.

Well, if that is the case, we are in a lot of big trouble. There is no way, or there is a way certainly that the executive branch can defy the Congress in the Congress' attempt to meet its responsibility for oversight of legislation it has passed. That is just an obvious out. There is nothing the Congress can do.

I don't know whether the Congress has done anything—I am not aware of anything—since that contempt citation was voted to say that it ought to be ignored. I have a feeling that technically if the obligation was there in December, it is there today.

Mr. BRAND. I will say the law of this circuit is very clear that there can be no purgation of congressional attempts, that the statute is punitive in nature; it punishes past contempts and thereby seeks to deter future ones. Nothing has happened which changes that.

Whether the U.S. attorney should now present—during the negotiations on this agreement that Congressman Levitas signed, that was very much a point of discussion. Without presuming to tell any U.S. attorney how he should do it, I suppose the cleanest way to do it would be to present the original resolution and present any subsequent one that this committee might pass saying it has been satisfied, compliance has been effected in mitigation thereof.

Under that situation, it would in all likelihood be probable that a no bill would result and that certainly would be the end of the matter.

Mr. SNYDER. Let me interrupt.

The CHAIRMAN. Go ahead.

Mr. SNYDER. I think when the chairman was talking about how bad a situation it would be, actually the U.S. attorneys got us by the whatever—the throat, whatever—under these kinds of circumstances because even without that kind of action on the part of the Congress saying that there has been a compliance, Mr. Harris or any U.S. attorney—probably ought not to be getting into personalities—could have walked into the grand jury and the way they yang around the grand jury, all he had to do was say "Well, Congress voted it, there is a political thing, there is nothing to it, I am asking you to not return a true bill," and they would have returned a no-true bill then, and he still would have been in control of the situation and not been here today, I suppose under those circumstances.

So even under that—that is a situation that does exist, could exist, is that not correct?

Mr. BRAND. That certainly could exist.

The CHAIRMAN. You would admit, and he would admit what many of us feel was his responsibility by doing it?

Mr. SNYDER. He would have——

Mr. BRAND. He would have presented it to the grand jury.

Mr. SNYDER. It would have performed what you say is the duty to present. I would not agree he had performed his duty, if he had done that. That is a matter of judgment. He would have been in compliance with the statute.

Mr. BRAND. Facially, anyway.

Mr. MOLINARI. Mr. Chairman.

The CHAIRMAN. The gentleman from New York.

Mr. MOLINARI. I think we also have to recognize another fact that the gentleman from Kentucky outlined in the procedure that could have been followed, but there is an old saying among veteran attorneys that you never know what a grand jury is going to do.

I think there is an intervening event here that did occur, and we should not overlook it. That is that there was an agreement, two agreements, as a matter of fact, reached between the administration and the chairman of the Subcommittee on Investigations and Oversight, Mr. Levitas.

If you look at the language of that, specifically the second memorandum, it is clear that at least as far as our subcommittee was concerned, we spelled out certain procedures where if they were implemented by the administration, that we were going to be satisfied; and in fact the language went further and stated that there would be implementation of procedures established therein constituting a purging of the resolution of the House of Representatives of December 16, 1982, certifying that compliance with the subcommittee subpoena had been effected, that the House finds no reason for further proceedings, et cetera, et cetera, et cetera.

Now this was a statement entered into in good faith. God knows, the chairman of the subcommittee, Mr. Levitas, did everything humanly possible to avoid going to the contempt stage.

But in terms of whether or not the U.S. attorney had any discretionary power whatsoever, it would seem to me that once this agreement had been put into play, that certainly he had every right in the world to exercise whatever discretion he might have had.

We added to that discretionary power, whatever it may be; and the language is clear, it is explicit, speaks for itself. I think it is part of the reason we are here today.

The CHAIRMAN. I thank the gentleman for his statement. I feel we are in a situation where the House of Representatives and the Congress is absolutely powerless.

Mr. MOLINARI. I didn't say that, Mr. Chairman. If you will yield, I didn't say that at all. What I am saying is this: We are dealing with a very difficult, complex area. I think that one could spell out an argument here stating that regardless of what action the subcommittee took and what action the full committee takes, you could spell out an argument that the U.S. attorney still has an obligation; but I think if you look at it in the total context of what happened, what happened was action was taken by the subcommittee, the full committee, and indeed the House because of lack of cooperation on the part of the administration and administration officials, the Department of Justice, maybe people in the White House.

It was only as a last resort that that action was taken. You were right. It is only at that particular point in time when any serious negotiations took place. We all hoped to avoid that confrontation.

But thereafter, the civil action was dismissed. The judge in his decision did not direct the U.S. attorney to proceed to put the matter before a grand jury. As a matter of fact, he was silent on the subject. He said that—as I recall, in his decision, that the courts are very reluctant to get involved in such things and that what he wanted to see was negotiations ongoing between the legislative and executive branches.

Indeed, that did take place shortly thereafter and an agreement of understanding was reached which was complied with. We have had testimony to that effect. I am not suggesting that there was a direction to the U.S. attorney that he proceed no further; not at all. What I am suggesting is that at this point in time, I think we should be very careful in the record that we are establishing, and I think when we get to that portion of the full committeee meeting when we are discussing the adoption of the resolution—and we will go into that in further detail—I just wanted to make that point.

I would like to ask Mr. Brand a question.

The CHAIRMAN. I would like to follow up on that before you ask it. Maybe you can enlighten us more. Where you make a point of the fact that when the civil suit was dismissed, a big point the judge did not direct the attorney to proceed to the grand jury with the contempt citation. The answer would be, so what? The Congress already had, and to me the fact the judge didn't say anything later on——

Mr. MOLINARI. I——

Mr. LEVITAS. Would the gentleman yield? This is for clarification. I am reading from the opinion of the judge in dismissing the case filed by the Justice Department in the name of the United States. On page 4, at the top of the page, in discussing the statute, the judge describes the procedures, and I will read these two sentences, because I think they are very pertinent.

It says: "The President or the Speaker in turn delivers the contempt citation to the appropriate U.S. attorney. The U.S. attorney is then required"—I repeat, "required to bring the matter before the grand jury."

I think the judge in this case clearly found that the word "shall" means "shall." The word "required" is used in place of the word "shall", and when the judge wrote that language, he was saying that the U.S. attorney is directed, required to bring the matter before the grand jury.

So far as I know that hasn't been done.

Mr. BRAND. I would add, if I could, Mr. Chairman, that in that line the judge also said that there might come a time when he would have to resolve this matter, but it is clear to me from reading his opinion he meant that in the context of a criminal case which would be brought assuming the parties could not work it out. He stated that the contempt process was an oddly and often approved means of indicating constitutional defenses, that if the parties insisted upon their present posture of confrontation, the courts would have to resolve it in that context. That might be difficult, but that that was the way that it had been done before.

So I think the judge clearly contemplated that this could well come to a grand jury and to trial if the parties resisted further attempts to resolve it by negotiation.

Mr. ALBOSTA. Mr. Chairman.

The CHAIRMAN. Some people have been looking for recognition. The gentleman, several moments ago, the gentleman from Wisconsin?

Mr. MOODY. Going back to your earlier comments, what you are essentially saying is that the U.S. attorney acted strictly in a ministerial function, almost a messenger function, and that Congress is really presenting this subpoena to the grand jury. Would that be overstating the matter?

Mr. BRAND. It is an interpretation, I think you can put on the legislative history and the Supreme Court interpretation of the statute.

Mr. MOODY. Another concern I have—suppose that this matter is dropped now and that Mr. Harris' view prevails, would that establish a precedent for the future whereby it could be pointed out that in this case it was never brought, that discretion was established, that future Congresses would have their powers diluted by us blinking and permitting Mr. Harris to behave in this way?

Mr. **Brand**. I think there is a danger of that. The danger of that is that now people think that there is a new window of negotiation; and noncompliance and that that window of noncompliance and negotiation tolls when we certify, but that that didn't really mean anything, because the U.S. attorney can stand mute or resistant and fail to go forward.

That message has been communicated to the world at large, and I think that that is a very dangerous message to be carried out to the world in terms of Congress' ability to obtain documents and obtain testimony.

In that line, several members have introduced a bill to mandate a special prosecutor in these circumstances so that it does not happen in the future, but clearly it can and in one instance has been seized upon by a contemner as a reason why compliance with congressional subpoenas should not be necessarily a matter of great concern.

Mr. **Moody**. That is a concern of mine in this case.

In answering the arguments of Congressman Molinari that this matter has been, in effect, mooted it is not mooted. It is very much alive and before us, whether or not we are going to permit a precedent to stand which can be argued in future times that Congress doesn't mean "shall" unless it follows through and enforces "shall" in very specific ways subsequent to its internal certification.

That bothers me a great deal.

If this case, let's assume, is mooted——

Mr. **Brand**. I don't assume that.

Mr. **Moody**. If, it were, Congress always has the ability to decertify or take action which would in fact make it moot.

Mr. **Brand**. I am not sure it does. The precedents—as a matter of parliamentary law, if nothing else. I don't think it has. This contempt occurred in the last Congress. The last Congress, like all Congresses, lapses at the adjournment sine die of the session, of the second session.

So I think it is doubtful whether a subsequent Congress could in any way revoke or modify or recall a certification of contempt that occurred in a prior Congress.

Mr. **Moody**. Then we would have to rely on the facts presented to the grand jury to speak for themselves. In that case, the grand jury might decide this matter was no longer worth returning a true bill.

Mr. **Brand**. That is what I indicated to Congressman Snyder earlier. It might well be the best course, as far as the contemnor is concerned. I don't know there would be anything to prevent, the way the situation is now, a subsequent U.S. attorney from looking around and seeing what cases he might bring and picking this thing up 3 years from now and saying well, here is a nice one that no one ever prosecuted; I think I will do the honor of presenting this to the grand jury.

There is obviously statute of limitation and other problems. Certainly to the extent we leave it hanging, it is hanging as to the contemnor as well.

Mr. **Moody**. Both parties are uncertain, Congress and the contemnor?

Mr. **Brand**. Yes.

The CHAIRMAN. Mr. Brand, do you say that this Congress cannot purge Mrs. Burford from contempt?

Mr. BRAND. I think the law makes it clear that you cannot purge criminal contempts. You can rob the bank and give the money back; you have still committed a crime. It might be mitigation of circumstances, but it is not known—in the contempt area it is impossible to purge a criminal contempt.

The CHAIRMAN. To follow up just on that, the subcommittee, I guess you are aware, on Investigations and Oversight has passed a resolution concerning this matter which may soon be before the full committee and before the House of Representatives. Can this resolution negate the requirement of the U.S. attorney to present the contempt matter to the grand jury?

Mr. BRAND. I think in this case because we are so far out of any precedents we are plowing new ground. The most we can say is what we have said, that we cannot purge criminal contempts. The last Congress acted and a subsequent Congress cannot take any action to change that.

I don't know that I can really express a final view on the question of whether it negates or qualifies or otherwise——

Mr. SNYDER. I have a little problem with letting that stand that you cannot purge criminal contempts. Lord, how many times have you heard of a judge sending a guy to jail until he purges himself of contempt?

Mr. BRAND. That is civil contempt, Congressman. I would like to refer to two cases, one the *United States* v. *Brewster* in this circuit, 255 F. 2d 899 and the case of *Journey* v. *McCracken* which is a Supreme Court case.

Mr. SNYDER. Let me ask you this: The fact this Congress cannot do anything to negate the action of previous Congresses in this regard so far as passing something that has some legal and binding effect, if that is true, isn't it also true that we cannot change the laws of the previous Congress, adjust their appropriations for the current year?

What about——

Mr. BRAND. No. Because I think that is—when we talk about changing laws, we are talking about something different than the inherent powers of the House of Representatives as a component of the legislature.

Mr. SNYDER. But the same component, the sine die adjournment having been completed, that is the end of it, that principle still exists.

I am through. I just thought I had a problem with that interpretation. I am not enough of a lawyer to hurt.

Mr. BRAND. Again I would represent to you that the state of the law in this circuit and every other circuit is that criminal contempt is incapable of being purged. Civil contempt is a situation where you hold the keys to your cell and at the moment of purgation you are free. Criminal contempt is different.

The CHAIRMAN. The gentleman from Michigan.

Mr. ALBOSTA. Mr. Chairman, I would like to ask the counsel a question. I would like to set up a scenario that could happen or may have happened somewhere in history. This pertains to the Supreme Court.

If there was a case of Congress acting on some particular law and Congress was not clear enough, the intent of Congress would be taken into consideration by the Supreme Court. Would that not be a fact? Through some statements on the House floor, through a debate colloquy, whatever?

Mr. **Brand**. If a statute is ambiguous, the courts will attempt to reconcile that ambiguity through looking at the legislative history. That is right.

Mr. **Albosta**. Let's set up a scenario where it was not clear as to what the intent of Congress by the statute itself might be and the time that someone should act on a particular piece of legislation, and there was enough colloquy, committee debate, and so forth that would suggest perhaps that the attempt of Congress was very clear during that session of Congress and during that particular piece of legislation being enacted and that they wished to have a speedy action or swift action taken by those people that are supposed to administer the law.

Would they not and wouldn't there be case history where the Supreme Court would have ruled that the intent of Congress, if there was language indicating that, was that it should take place within a reasonable amount of time?

Mr. **Brand**. As an inveterate Supreme Court watcher, I would never warrent what the Supreme Court will hold.

Mr. **Albosta**. It seems to me without—just from memory, that I can remember that there have been cases where definitely the Supreme Court can say that the intent of Congress prevailed and the intent of Congress was this. It was another session of Congress and you cannot let this session of Congress say what the last session of Congress was.

Mr. **Brand**. You focused me in. There are such cases.

Mr. **Albosta**. Sitting on the last session of Congress, when this committee did its duty and used all reasonableness in trying to prevail on the administration to prevent us from taking this action, it was the intent after we did take it, in my opinion, to have action taken immediately by grand jury and by the U.S. District Attorney's office. I would think that that should be part of what we are talking about here today; and similarly, if we are to make judgments, we have to go back to some case history on that particular issue of what was the intent of Congress.

Was it the intent of Congress to leave it go until another administration takes over, another U.S. attorney? Did they want it down now? I think the answer would fall that the last session of Congress did want action taken immediately.

The **Chairman**. The gentleman from New York, Mr. Molinari.

Mr. **Molinari**. Mr. Brand, you are familiar and probably know by heart the memorandum of understanding dated March 22, 1983, entered into between Chairman Levitas, Fred Fielding, and Ed Schmults?

Mr. **Brand**. Yes.

Mr. **Molinari**. Were you present at the signing of that agreement?

Mr. **Brand**. At the signing and all the drafting sssions.

Mr. **Molinari**. What was your role?

Mr. **Brand**. My role was with Carol Dinkins to reduce to writing the understandings of the parties that were negotiating and to advise the principals—in this case Chairman Levitas—on points of law that were being addressed.

Mr. **Molinari**. Were you acting as counsel for the House of Representatives?

Mr. **Brand**. I probably was; yes.

Mr. **Molinari**. Would you mind then reading for us paragraph 10, the last paragraph?

Mr. **Brand**. I don't have my copy.

Mr. **Molinari**. Could somebody furnish a copy of that memorandum of understanding?

Mr. **Brand**. I have it before me now.

Mr. **Molinari**. Could you read paragraph 10?

Mr. **Brand** [reading].

> Following satisfactory procedures set forth in the memorandum of understanding dated February 18, 1983 as amended herein, the chairman of the subcommittee represents that he will undertake and use his best efforts to introduce an appropriate resolution for consideration by committee in the House of Representatives. An essential and nonseparable condition of this agreement is that the House of Representatives will adopt a resolution containing recitals that complementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of December 16, 1982, certifying that compliance with the subcommittee's subpoena has been affected, and that the House finds no reason for further proceedings and providing for the speaker to certify all of the information going to the United States Attorney.

Mr. **Molinari**. There may be argument as to the language of the statute, that it compels or doesn't compel, the U.S. attorney to bring an action by the grand jury after the House votes contempt. This language to me seems very simple and easily understood. You were serving as counsel to the House of Representatives and incorporated in there is a statement that upon compliance—and we have since found compliance at the subcommittee level—that the House of Representatives would adopt a resolution that the implementation constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982.

It is or is it not a purging?

My problem is this: I believe that in the early stages of this matter, there was a complete lack of good faith on the part of those at EPA and the administration. I believe we acted in good faith. I believe we acted in good faith when we executed the original memorandum of understanding and I believe we meant what we said when we signed this one.

How do we reconcile the fact that incorporated in this statement is a clear reference to the fact we intended there to be a purging and yet statements are being asked today whether indeed there is or is not a purging? Isn't it a question really of good faith in what Congress is intended to convey at this point in time?

Mr. **Brand**. If I may answer the question this way, the—there was a good deal of discussion about that in the negotiations, obviously. The part that is quoted—and I will quote it again for clarity. It says "An essential and non-separable condition of the agreement." The agreement was signed by Chairman Levitas. It was not signed by the House, the full committee, or anybody else in the

House of Representatives. It is a condition of the agreement. It was not binding on the House or binding on any other Member.

And for that reason, forms no part of the resolved clause of the resolution that you and I have had many discussions about which effectuates this agreement. So I think as a matter of contract law, if nothing else, this part of the agreement is consistent and the resolution is consistent with that which was entered into by Chairman Levitas.

Mr. MOLINARI. Are you suggesting if the full House adopts the resolution, then the purge would come into effect?

Mr. BRAND. I think purging is a word that there has been a lot of discussion about. My position is there is no way to purge. All we can do is represent that compliance has been affected and we see no need for further proceedings and send that over to the U.S. attorney as we did the original resolution.

Mr. LEVITAS. Will the gentleman yield on this point? Would the gentleman from New York yield to me?

Mr. MOLINARI. I will yield to the gentleman from Georgia.

Mr. LEVITAS. Thank you for yielding.

Simply to clarify that particular paragraph and what led up to it, the language as you say speaks for itself. There was a considerable amount of discussion about that during the neogtiations between Fred Fielding and myself; and Ed Schmults. It was made very clear to both of those gentlemen that there was considerable doubt as to whether this Congress could undo anything the prior Congress did. Mr. Fielding and Mr. Schmults were well aware of that fact. What we were attempting to do or what I was attempting to do in order to get early access to these documents was to say that if we got these documents without another year-and-a-half of litigation and putting people in jail, that I would be willing to represent there was compliance, or substantial compliance and would attempt to purge the resolution previously adopted, recognizing that it was very likely we couldn't do it, legally; and I don't think there is any doubt in Mr. Fielding's mind, or Mr. Schmults' mind as to that, because we literally spent hours talking about this, trying to find out if there was any precedent.

There is no precedent that we are able to put our hands on or able to find. All the indications, the suggestions, are to the contrary; but I just want to make that point.

Mr. BRAND. The chairman refreshes my recollection.

Mr. MOLINARI. Before you go, Mr. Brand, Mr. Levitas, there—wasn't it really an attempt to whatever extent was possible on our part to take steps that could get as close to purging as possible?

Mr. LEVITAS. Yes; as a matter of fact, I went on to say that from my own point of view, I was not interested in seeing Mrs. Gorsuch go to jail. It was for that reason that I expected, anticipated, that if there was compliance, and if the matter went to the—if there was performance on the part of the administration, that we would at that point adopt this resolution with the belief that at that point, both from the U.S. attorney's point of view and from Mrs. Gorsuch's point of view, the original certification and the subsequent certification would both be presented to the grand jury and the grand jury would take such action as they deemed appropriate and hopefully, from my perspective, return a no true bill.

Mr. MOLINARI. I just want to yield to the gentleman from Kentucky, if I may, Mr. Chairman.

Mr. SNYDER. I just wanted to ask Mr. Brand to reflect upon chapter 15, section 21, the first paragraph giving a summary of the whole thing, as the following precedents reveal, a witness may be purged of or freed from contempt under procedures parallel to those used in citing for contempt; submission of a report of the committee and approval of a resolution authorizing the Speaker to notify the U.S. attorney to drop the prosecution. Of course, it deals with some of the committee on un-American activities cases.

Mr. BRAND. That precedent was raised. I think that was a precedent involving the same Congress.

Mr. SNYDER. I think you are right about that. You think it was the same Congress, no question about that. It looks to me, though, like that is the precedent.

Mr. BRAND. If you read the debate on that, as I have, you will see that several members I think expressed the view that that purging resolution was—that they couldn't control whether the U.S. attorney would revoke—they couldn't call back, but they could at least express their view that they were no longer interested.

Mr. SNYDER. But your earlier argument was that you couldn't purge a criminal attempt. It sounds to me like you can, one. Two, it sounds to me like there certainly is an element of equity involved if you are willing to be contemptuous of the Congress on the first day of a new session, you have 2 years to purge yourself; but if you want to do it on the last day, that way you cannot.

Mr. BRAND. That is only because they refused to proceed in this instance. The fact of the matter is that if the U.S. attorney had moved before the grand jury on December 17 and an indictment had been reported, I am not sure that there is any purging that could have occurred thereafter. The entire matter was thrown into confusion by the fact that there was no proceeding.

I think the law—there are two separate issues. There is the issue of parliamentary law and what Congress can do to affect prior Congress and there is the matter of precedent in this circuit that holds that a criminal contempt is a completed act that is punishable.

Mr. SNYDER. It just strikes me that the courts are saying that the Congress makes their rules and we are not going to determine—if they say they can purge a contempt in their rules and precedents, I think they can say they are going to do it.

Mr. BRAND. They have said the opposite in certain cases I have referred to.

The CHAIRMAN. Thank you very much, Mr. Brand.

Are there any other questions?

The gentleman from Georgia. I would like to state as far as my understanding of the agreement, which is supposed to be a separate issue here, that what was signed and what was—what the gentleman from Georgia signed to as to what his actions would be have been done and done very successfully in introducing a resolution and doing everything he can to get it passed, he has had it pass the subcommittee and met his obligation fully.

Before I recognize him, I would like to say I am learning something about lawyers which is very good. I find with lawyers that a paragraph they agree with is very clear and simple; when they disagree with it, it is extremely ambiguous.

The gentleman from Georgia.

Mr. **Levitas**. Mr. Brand, would you submit to the committee and I would request unanimous consent to make part of the record the certification of contempt in the Anne Gorsuch matter, a copy of the pleadings filed in the civil action titled *United States of America* v. *the House of Representatives of the U.S., et al.,* and the decision of Judge Smith in dismissing that action, if those documents could be made available?

Mr. **Brand**. Certainly.

The **Chairman**. Without objection, they will be made part of the record. (See page 63.)

Mr. **Levitas**. So there will be no doubt about the matter, as far as I am concerned there is no prosecutorial discretion involved in this particular statute in terms of the role of the U.S. attorney; but, Mr. Brand, assuming there is such a doctrine of prosecutorial discretion that would be presumably applicable, are there any elements or criteria or factors which go into ascertaining what is prosecutorial discretion such as the strength or weakness of the case, the availability of the accused to provide testimony in other cases for—against other defendants?

Are there any elements or is it a purely undefined, arbitrary decision of a prosecutor?

Mr. **Brand**. Well, I think it is a basic decision to decide as a matter of policy when to prosecute and when not to prosecute based on a variety of factors.

Quality of the case, the law, and any other factors that are relevant to the administration of justice.

Mr. **Levitas**. The House of Representatives recently held in contempt by resolution one Rita Lavelle and certified that matter to the U.S. attorney. Do you know—and I understand from the press that Ms. Lavelle has been indicted by a grand jury here in the District of Columbia.

Do you know how long following the certification of contempt in the Lavelle matter it was presented to the grand jury?

Mr. **Brand**. My recollection is it was about a week after the certification by the Speaker.

Mr. **Levitas**. Does a grand jury have the power to direct the U.S. attorney to present to it matters which it wishes to consider on its own—on its own initiative or can it—is it solely dependent on the U.S. attorney for presenting to it matters for its consideration?

Mr. **Brand**. There are cases which discuss the independent authority of the grand jury to pursue any leads that they so desire, whether they learn those through newspapers or on the street, as it were.

As a matter of practice, it is sometimes difficult for the grand jury to pursue those leads if the U.S. attorney is committed to a course of conduct contrary to the wishes of the grand jury, because it doesn't have independent investigators or accountants or others that it can use; but clearly, it has the authority to go wherever it so chooses.

Mr. **Levitas**. And in this particular instance, if the grand jury so chooses, presumably they would have the power to direct the U.S.

attorney to present to them the certification of contempt in the Gorsuch matter?

Mr. **Brand**. I think that would be one of the matters they could take notice of and pursue.

As I say, the cases indicate they can take things out of the newspaper and pursue them and they have on many occasions done that.

Mr. **Levitas**. Just one last question: I believe you have made it part of the record that the civil action which was dismissed by the order of the court, the period for appeal of that matter has now passed?

Mr. **Brand**. Yes; my understanding is it passed roughly on April 4, which would have been 60 days if you concede that this action was brought by the United States or an agency or officer therefor, past the 60-day time limit for noticing of appeal.

Mr. **Levitas**. Does that mean that action is no longer pending?

Mr. **Brand**. I think it is conceded by everyone it is a closed case.

Mr. **Levitas**. I thank you very much, Mr. Brand, for clarifying some of these points.

I think the observation made by my colleague from Wisconsin, Mr. Moody, is a very significant one, and it goes to the heart of whether or not the failure of the U.S. attorney in this instance to present the matter to the grant jury even after the pending civil action was dismissed raises very serious questions as to the precedent; and I think it is vital that the Congress make some judgment in whatever context, legislatively, through other procedures available to us under the constitution, that our view of this statute of congressional contempt requires the U.S. attorney, as Judge Smith said, to present the matter to the grand jury.

Thank you very much.

The **Chairman**. The gentleman from New York, Mr. Molinari.

Mr. **Molinari**. Mr. Brand, given where you are today, do you see any reason for the U.S. attorney to conduct further proceedings under the contempt citation?

Mr. **Brand**. I express no view on whether he should or shouldn't.

I thnk having been involved in negotiating and writing the agreement it is clearly the import of the agreement; and if the agreement is adopted and the resolution is adopted by the full House, that the House will have spoken on that and expressed its view that there is no need for further proceedings.

Since we are not quite yet at that point, and because of my position on this in front of the committee, I am not sure it would be appropriate for me to take a position with respect to what now the U.S. attorney should or shouldn't do.

Mr. **Molinari**. You did have a hand in the drafting of the memorandum of understanding which set the tone for where we are going from here on in?

Mr. **Brand**. Sure.

Mr. **Molinari**. In drafting the——

Mr. **Nichols**. I think the U.S. attorney would maybe rightfully be in a position to scream about my interfering in his discretion if I made statements about what he should and shouldn't do at this point.

Mr. **Molinari**. The question that I have which I asked you before at the subcommittee level, and I would ask you again now for the record: Since it was the—clearly the intent of the subcommittee, and that is the only body we have heard from officially so far, and they have implemented the language that was incorporated in the memorandums of understanding, do we not believe that the provisions stating that no further action is necessary should be in a resolved clause in the resolution when the full committee takes it up and when the House takes it up?

Mr. **Brand**. I think as you and I have had this discussion before both on and off the record, it is a matter of judgment. It certainly could be done that way. My reading of the agreement, as I indicated, is that it is—it was a condition of the agreement, not a condition on the House of Representatives.

At the point at which the House adopts or to the extent it adopts the agreement, it could change in any way it so desires. That I think is a matter committed to the discretion of the committee and the members. I am not sure it is a legal question.

Mr. **Molinari**. Excuse me?

Mr. **Brand**. I am not sure it is a strictly legal question.

Mr. **Molinari**. That is what I am interested in, whether there is any difference in legal interpretation. The recitals whether they are in the resolved clause or the whereas clause, I asked you that in your capacity as counsel.

Mr. **Brand**. As I think I indicated at the subcommittee, the resolution was drafted with a view toward some symmetry with the original resolution and the whereas clauses were put in in the contemplation of what occurred prior to this matter getting to the floor.

So all matters occurring prior to it getting to the floor were put in the whereas clause as opposed to the resolve clause. The House is resolving to send all of these representations that were over to the U.S. attorney; and for that reason, it was drafted in that way. It could be altered in any way that the committee sees fit as a matter of discretion, taking into account the serious precedential impacts that we face in this case.

This is a—we are writing for the first time in 190 years on a matter of great importance to the House.

Mr. **Molinari**. I understand that. That is precisely the reason I continue to ask that same question.

Mr. **Brand**. We have been very careful and conservative in how we have done that because of that factor.

Mr. **Molinari**. Let me ask you this last question: In your capacity as counsel for the House, would there be any difference legally whether the recitation that the House finds no further reason to proceed—for proceeding—let me quote it exactly. "That the House finds no reason for further proceedings"; would there be any difference, in your professional opinion, wether that is contained in a whereas clause or in the resolved clause of the resolution that will be adopted by the full Committee of Public Works and Transportation and the full House of Representatives?

Mr. **Brand**. None other than what I have already indicated.

Mr. **Molinari**. Thank you very much.

No further questions, Mr. Chairman.

The CHAIRMAN. Mr. Brand, thank you very much. We hope you will remain available for this afternoon's session.

The committee stands in recess until 1 p.m.

[Whereupon, at 12 noon, the committee was recessed, to reconvene at 1 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Our next witness is Mr. Stanley S. Harris, U.S. attorney for the District of Columbia.

Mr. Harris, thank you very much for appearing. Please stand and raise your right hand.

[Witness sworn.]

The CHAIRMAN. Thank you for your patience and for your presence here today.

Without objection, the members have a copy of your statement, and it will be made a part of the record at this point.

[Mr. Harris' prepared statement follows:]

STATEMENT OF STANLEY S. HARRIS, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA, BEFORE THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES

My name is Stanley S. Harris. Since February 5, 1982, I have been the United States Attorney for the District of Columbia.

By letter dated June 2, 1983, Chairman Howard requested that I appear before you to discuss the handling of the contempt citation which was voted by the House of Representatives against Anne Gorsuch Burford in her former capacity as Administrator of the Environmental Protection Agency.

The appearance of a United States Attorney to testify before a Congressional committee concerning a pending case is extraordinary. Normally such testimony may not be compelled, and a United States Attorney may not testify without the express approval of the Attorney General of the United States. Several factors have resulted in my being here this morning. First, President Reagan and Attorney General Smith decided that a policy of full cooperation should be extended to Congress concerning the EPA controversy. Second, on May 31, I met informally with the General Counsel and other staff attorneys of the House Judiciary Committee, and in that meeting I advised them of essentially everything which I shall convey to you today. Third, the resolution introduced by Congressman Levitas which would have the equivalent effect of purging Mrs. Burford of contempt has been passed by the Investigations and Oversight Subcommittee and is now pending before you. Hence, while there may be some questions which I am not free to answer—such as hypothetical questions or ones relating to Mrs. Burford's possible legal culpability—I am pleased to be here to be of whatever assistance I can.

I should stress initially that my role in the controversy concerning the subpoena which was issued to Mrs. Gorsuch on November 16, 1982, has been a minor one. When I was served with the contempt citation on the night of December 17, 1982, I also was provided the December 15, 1982, report of this committee. (H. Rept. No. 97-968, 97th Cong., 2d Sess.) That lengthy report reflects a continuing disagreement between the Executive and Legislative Branches as to the production of what had been characterized rather accurately as enforcement-sensitive documents. I played no part in the exchanges of views which took place concerning the subject documents.

It was clear to me that the differing views expressed by the Executive and Legislative Branches were sincerely held on both sides. It was my hope that an early accommodation would be reached, but that was not to be. As the contempt machinery began to move forward in the House of Representatives, the Executive Branch began to prepare for the submission of the issues to a court for a resolution. On or about December 15, 1982, the Civil Division of the Department of Justice provided my Office with a draft of a complaint which would be filed in the United States District Court for the District of Columbia if a contempt citation were voted. Under 28 U.S.C. § 547, I as the United States Attorney am responsible within the District of Columbia for prosecuting, on behalf of the Government, all civil actions, suits, or proceedings in which the United States is concerned. While the basic work on the draft complaint was done by the Civil Division of the Department of Justice, I read the draft and made a number of minor editorial suggestions.

On the night of December 16, 1982, a contempt citation against Administrator Gorsuch was voted by the House of Representatives. Shortly thereafter the civil complaint was filed in the United States District Court. As is required, my name as United States Attorney was the lead name on that pleading. As is normal, I did not sign it. It was signed by J. Paul McGrath, the Assistant Attorney General in charge of the Civil Division, and several of his assistants. On the following night, December 17, the contempt citation was served on me.

Section 194 of Title 2 of the United States Code provides that when a United States Attorney is served with a contempt citation, it shall be his duty "to bring the matter before the grand jury for its action." The precursor of that statute was enacted in 1857, and it poorly suits the contemporary situation involving Mrs. Burford. It immediately was apparent that I was in a conflict of interst position, and that I could not prosecute her in a criminal case while I was representing her—at least nominally—in the civil action which had been brought on her behalf.

The dilemma which I faced was not, of course, one of my own making. Careful research was done of the legislative history of the contempt statute. That legislative history reflects that Congress felt obliged to transfer contempt adjudications to the Executive Branch in order to safeguard the constitutional rights of an accused. Included in those safeguards is the existence of the fair and independent judgment of the United States Attorney in deciding whether and when to prosecute. The contempt statute is like any other criminal statute passed by Congress, and once the matter is referred to a United States Attorney the status of Congress is akin to that of any complainant in any other criminal case.

As would be expected, I did devote intensive thought to the position in which I found myself. On the night of December 21, I reached two conclusions. The first was that the decisional responsibility as to any prosecution of the Administrator was solely mine as the United States Attorney; the second was that I should extend to the House of Representatives—and specifically to the Speaker—the courtesy of conveying my position as soon as possible. On the morning of December 22, I met with several of my senior Assistant United States Attorneys to express those thoughts. None disagreed. I then telephoned Assistant Attorney General McGrath, who had principal responsibility for the pending civil suit. I told him that the statute places the responsibility on me individually, rather than on the Department of Justice institutionally, and that I was prepared to write a letter to the Speaker of the House of Representatives advising him of the conflict of interest which precluded my presenting the contempt matter to a grand jury while the civil action was pending. Mr. McGrath asked if he could see a copy of my draft letter to the Speaker. I had no problem with that, and gave him a copy of an early draft that afternoon. Christmas intervened; the letter was finalized on December 27.

I then decided to deliver it personally to the Hill both as a matter of courtesy and so that I could answer any questions that might be asked. I telephoned Edmund L. Henshaw, Jr., then the Clerk of the House. Neither he nor the Speaker was available, but arrangements were made for me to deliver the letter to others. I handed one copy to Stanley M. Brand, General Counsel to the Clerk, and to Steven R. Ross, Deputy Counsel to the Clerk. They read the letter in my presence, but chose not to discuss the matter at all. The Speaker's letter was handed by me to his Council, Kirk L. O'Donnell. He read it, and then met with me for about 15 minutes during which we discussed the situation. (A copy of my December 27, 1982, letter to the Speaker is attached as an appendix.)

Meanwhile, the civil action proceeded. The designated plaintiffs—the United States and Anne M. Gorsuch—filed a motion for summary judgment; the defendants—the House of Representatives and various committees and individuals named only in their official capacities—filed a motion to dismiss. The District Court granted the motion to dismiss on February 3, 1983. In its opinion the court stated in part:

Courts have a duty to avoid unnecessarily deciding constitutional issues, *United States* v. *Rumely,* 345 U.S. 41, 45–46 (1952). When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. See *United States* v. *American Telephone and Telegraph,* 551 F.2d at 393–395. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution. See id. Since the controversy which has led to *United States* v. *House of Representatives* clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary.

The gravamen of plaintiffs' complaint is that executive privilege is a valid defense to congressional demands for sensitive law enforcement information from the EPA. Plaintiffs have, thus, raised this executive privilege defense as the basis for affirmative relief. Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. See, e.g., *Ansara* v. *Eastland*, 441 F.2d at 753-754. The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties. The Court, therefore, finds that to entertain this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act, 28 U.S.C. § 2201. See *Hanes Corp.* v. *Millard*, 531 F.2d 585, 591 (D.C. Cir. 1976). In light of this determination, the Court will not address the additional grounds for dismissal raised by defendants.

The dismissal of the civil action did not end my position of ethical conflict, for the plaintiffs had 60 days within which to note an appeal. In the meantime, as they had been so strongly urged by the court to do, the Legislative and Executive Branches pursued settlement. Intensive settlement efforts reached fruition on February 18, 1983, when a Memorandum of Understanding was agreed upon. It was signed by Elliott H. Levitas, Chairman of the Subcommittee on Investigations and Oversight of this Committee, by Fred F. Fielding, Counsel to the President, and by Edward C. Schmults, the Deputy Attorney General of the United States. Paragraph 7 of that Memorandum of Understanding provides as follows:

7. Following satisfactory implementation of the procedures set forth herein, the Chairman of the Subcommittee represents that he will undertake and use his best efforts to introduce an appropriate resolution, for consideration by the Committee and the House of Representatives. An essential and nonseparable condition of this agreement is that the House of Representatives will adopt a resolution containing recitals that implementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982, certifying that compliance with the Subcommittee's subpoena has been effected; that the House finds no reason for further proceedings; and providing for the Speaker to certify all of the foregoing to the United States Attorney.

On March 8, 1983, Mrs. Burford resigned her position as Administrator of the EPA.

The time for filing an appeal of the District Court's dismissal of the civil action was to expire on April 4, 1983. On April 1, Assistant Attorney General McGrath wrote a memorandum to the Solicitor General of the United States. In it, he stated in part: I recommend against appeal because the EPA documents now have been released to the Congress. This case therefore is effectively moot.

Notwithstanding all of these factors, I understand that some believe that I have had no discretion in handling the Burford contempt matter, simply because the statute uses the word "shall." Since less than one-third of the members of this committee are lawyers—which may be a good thing—and since only four members of the committee have been prosecutors, two basic points should be made. First, in every case of which I am aware, appellate courts—including the Supreme Court—have held that the word "shall" in a statute like 2 U.S.C. § 194 is directory rather than mandatory. Courts quite wisely have held that a legislature's use of the word "shall" does not deprive a prosecutor of his normal prosecutorial discretion. Second, a few words should be said about grand jury proceedings. They are not star chamber proceedings; far from it. The fact is that a prosecutor has an obligation to present exculpatory evidence as well as inculpatory evidence to a grand jury. While I am not free to discuss the merits of the Burford contempt matter, illustratively the grand jury would be entitled to know that she was following the instructions of the President of the United States in conducting herself as she did. Also, by way of further example, she would be given the opportunity—should she choose to exercise it—to testify before the grand jury.

Related to these factors is the question of resources. I head the largest United States Attorney's Office in the country, with 182 regular Assistant United States Attorneys and approximately 22 Special Assistant United States Attorneys. We have approximately 1,500 cases now pending, or awaiting presentation, before grand juries. We make every effort to utilize our grand juries with the maximum possible efficiency, with the least possible cost to the taxpayers and the least possible inconvenience to the grand jurors. With every signal saying not only that should the controversy be resolved by settlement, but also that it all but has been resolved by settlement, but also that it all but has been resolved by settlement—and with that settlement having been endorsed specifically by the Speaker and by your own Subcommittee on Investigations and Oversight—I respectfully submit that it would have been unwarranted for me to have presented the case to a grand jury prior to this date.

Finally, I would like to state personally that at no time has anyone in the Department of Justice given any directions whatsoever as to what he thought I should or should not do in the Burford contempt matter. And, less silence be misconstrued, the same is true with respect to the White House. There is only one person in the United States with the power and the duty to make the ultimate prosecutorial decision in this matter. Congress itself specifically invested that power and duty in the person who holds the position which I happen now to hold. I have exercised, and will continue to exercise, my most carefully reasoned prosecutorial discretion in this, as in any other, case.

That concludes my prepared statement. I would be happy to respond to questions, but please recognize that I am in a unique position as a witness before this distinguished Committee, and there obviously are inherent limitations on what I as a prosecutor permissibly may say about a pending case.

U.S. Department of Justice,
Washington, DC, December 27, 1982.

Hon. Thomas P. O'Neill, Jr.,
Speaker, House of Representatives,
Washington, DC.

Dear Mr. Speaker: This is in response to your communication of December 17, 1982, certifying to me House Resolution 632 regarding the production of documents by The Honorable Anne M. Gorsuch, Administrator of the United States Environmental Protection Agency.

On December 16, 1982, Civil Action Number 82-3583 was filed by the Department of Justice in the United States District Court for the District of Columbia. In that case, the Department seeks to have the District Court declare that the compelled production of the documents sought by the House of Representatives unconstitutionally would contravene important separation of powers principles, and that the subpoena issued for those documents is constitutionally defective. Pursuant to Section 547 of Title 28, United States Code, I am responsible within this district for prosecuting, for the Government, all civil actions, suits, or proceedings in which the United States is concerned. Accordingly, although the principal work in the pending case is being done by the Civil Division of the Department of Justice, I nonetheless am in the posture of being legally responsible for the prosecution of that civil action for the Government.

Under the same statutory section, I also am responsible for prosecuting, within this district, all offenses against the United States. As part of the discretion which I must exercise as the chief prosecuting officer of this district, a determination must be made as to when a matter should be submitted to a grand jury.

I am keenly aware of the provisions of Section 194 of Title 2, United States Code. It should be noted that that section of the Code quite properly does not include a mandate as to the timing of submitting a matter to a grand jury.

I recognize the degree of interest which you and your colleagues have in this proceeding. Accordingly, as a matter of courtesy I wish to advise you that I have concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved. While I recognize the likelihood that we are in disagreement over the underlying merits of the controversy, we do have a common interest—namely, achieving a resolution of the disputed questions as expeditiously as possible and with a minimum of adverse consequences to good government and to the country as a whole. Accordingly, I urge that you pursue with us the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.

You may be assured of my continuing and careful attention to this matter.

Respectfully,

Stanley S. Harris,
U.S. Attorney,
District of Columbia.

The Chairman.
Please proceed.

TESTIMONY OF STANLEY S. HARRIS, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. HARRIS. Very well, sir.

I concluded in beginning to review the facts for appearing before you that it would be desirable to submit a statement in writing for two reasons.

First, the subtleties in this case are quite complex, and, second, since this matter is a pending case at the present time, I wanted to be careful with the statements that I made. Had I testified this morning, I would have requested the opportunity to read the statement, but I am happy to have it read into the record and would be delighted to answer any questions I am able to.

The CHAIRMAN. Thank you very much. As you say, this case is pending now?

Mr. HARRIS. That is correct, sir.

The CHAIRMAN. Does that mean that you may be bringing this before the grand jury?

Mr. HARRIS. Yes, sir.

The CHAIRMAN. Why is it still pending and not been brought to the grand jury? It looks like you need more information or something. It passed in December. We had the court case. There was no appeal. All these things——

Mr. HARRIS. This particular case has been evolving over the months. At each point at which I had to make a decision, I have been presented with a different set of facts. At the time at which the contempt citation was served upon me, the civil action already had been filed.

I found myself in an ethical conflict which prevented me from presenting it to the grand jury within that time period.

The CHAIRMAN. Then you knew at the moment that the Congress voted this contempt that you would not be forthwith presenting it because you were part of an effort to thwart what the Congress did prior to the time the Congress even did it, is that true?

Mr. HARRIS. Well, in the first place I was not in the normal sense a part of it.

In the second place, I would not accept your characterization of thwarting what Congress did.

I think that the officials at the Department of Justice who sought to have these issues resolved in a civil setting rather than a criminal setting did so in good faith. The civil action had to be brought in my name as the U.S. attorney, so I nominally was counsel for the United States and Anne Gorsuch at that time when the suit was filed.

I knew only that there was the expectation that the civil action would be filed if the House did vote to cite Mrs. Gorsuch for contempt.

The CHAIRMAN. Was the White House involved in those discussions?

Mr. HARRIS. I have no idea. Not to my knowledge. As I indicated in my statement, I did not see the draft complaint until the day before it was filed, and the participation of me and other members of my office was minimal.

The CHAIRMAN. Would you presume that the decision to file the civil suit was made without any participation by the White House or any spokesmen for the—spokespersons for the White House?

Mr. HARRIS. I would have no idea. I assume it is a matter of common knowledge that there was White House participation in the decision with respect to the so-called enforcement-sensitive documents so I would assume there was contact between the White House and the Department, but I was not part of that.

The CHAIRMAN. But that would then fly in the face of the fact that at the time that the Department of Justice and you and—with direct or indirect, which you have no direct knowledge of, but of the White House being involved in this, at the same time the White House was telling those of us in the Congress who were trying to work something out that they were still looking over and had not yet made a decision as to whether or not to comply with the request of the Congress which would have negated the contempt citation? It wouldn't even have been voted on.

Mr. HARRIS. I am sorry. I have no personal knowledge of what was happening on that front.

The CHAIRMAN. Who made the decision to bring this civil suit?

Mr. HARRIS. I do not know. It was essentially a Department of Justice decision, but from an individual standpoint, whether the Attorney General or—I assume the Attorney General certainly approved it.

The CHAIRMAN. Was there discussion of the contempt citation during whatever discussions you had on the preparation of the civil suit?

Mr. HARRIS. I think that the answer to that is no, with the exception of the fact that—the very obvious fact that the filing of the civil suit was contingent upon the voting of the contempt citation.

The CHAIRMAN. You wouldn't even have been there doing it if it weren't for the fact that a contempt citation was imminent?

Mr. HARRIS. That is correct. The hope, as I expressed, of those involved in that particular decision, was that these matters could be resolved civilly.

The CHAIRMAN. Well, did you state before that you feel that you may still be bringing this before the grand jury?

Mr. HARRIS. The case is still pending. No final decisions have been made with respect to it.

The CHAIRMAN. So we have a situation where the Congress of the United States voted a contempt citation, which—in nonlegal terms, is somehow certified by the Speaker to you; correct?

Mr. HARRIS. Correct.

The CHAIRMAN. Which, in many cases, you bring right to the grand jury?

Mr. HARRIS. Well——

The CHAIRMAN. As you did with the *Rita Lavelle* case, right?

Mr. HARRIS. Yes.

The CHAIRMAN. Was that you who brought that?

Mr. HARRIS. Not I personally.

The CHAIRMAN. Your office, your responsibility?

Mr. HARRIS. That is correct. Congressman Levitas raised a question as to the timing of the Rita Lavelle matter. I think it might be worthwhile for me to complete the record on that. Two hours after the House voted its contempt citation in that case, I assigned it to an assistant U.S. attorney for presentation to a grand jury.

That was 2 days before we received the contempt citation. Two working days after we received the contempt citation, the matter was presented to a grand jury and the indictment was returned 5 working days after we received the contempt citation.

The CHAIRMAN. You were working on this before they even certified it? Right after you heard from the newspapers or something that there was a vote?

Mr. HARRIS. Yes. It was promptly assigned to an assistant for handling.

The CHAIRMAN. Before we get into what discretion you may or may not have or feel that you have in there, you did state what you felt were the reasons why you did not proceed with what many people feel was a directive from the Congress through the Speaker to you.

One of them was that a civil suit was being filed and you were on the other side in that civil suit. So, therefore, you couldn't play both sides and be an active factor against the House of Representatives, and at the same time be, "an agent of the United States before the grand jury," so, for that you said, "That is one of the reasons why, for all that time, I didn't do it."

Mr. HARRIS. Correct.

The CHAIRMAN. Then that was dismissed summarily, I guess, by the court?

Mr. HARRIS. Dismissed summarily with a very strong suggestion that the matter was basically political in nature and the court expressed the hope that the matter could be resolved through settlement and encouraged the parties to undertake the settlement negotiations, which they did.

The CHAIRMAN. Which we all had been hoping for for quite some time.

Mr. HARRIS. I shared that hope.

The CHAIRMAN. Apparently almost everyone did except some people with the most power in the Nation.

Following that you might be expected then, since the countersuit which was the reason that you didn't bring this before the grand jury was the suit, then you again or still or once again I guess, decided not to follow the directive of the Congress because there was an appeal time, right?

According to your testimony.

Mr. HARRIS. That is correct, sir.

The CHAIRMAN. When did you finally—how many days was that?

Mr. HARRIS. The appeal time was 60 days.

The CHAIRMAN. Sixty days?

Mr. HARRIS. It expired on April 4. A recommendation against appeal was made by the Assistant Attorney General in charge of the Civil Division, Paul McGrath, on the basis that in his view the matter was effectively moot by virtue of the production of the documents to the House. So the civil suit was——

The CHAIRMAN. Wait a minute. Go ahead. Continue.

Mr. HARRIS. I had concluded that comment.

The CHAIRMAN. You figured the whole thing is over with because of documents coming to the Congress, therefore. That is why you didn't appeal?

Mr. HARRIS. Excuse me. I am afraid I have been misinterpreted, sir. What I said was that Paul McGrath, the Assistant Attorney General in charge of the Civil Division, in recommending against the appeal, made the statement that he considered the matter to be effectively moot.

The CHAIRMAN. It wasn't because you felt—was there any kind of feeling that you had such a weak case that it was dismissed the first time around; that may be a reason not to bring an appeal on it?

Mr. HARRIS. I was not a party to the appeal decision. That was handled by the civil division of the Department of Justice.

The CHAIRMAN. So that did end anyway, in April?

Mr. HARRIS. That is correct.

The CHAIRMAN. So there were two reasons that you feel valid for not bringing it to the court, and now there is a reason between then—it is still active, you say, now?

Mr. HARRIS. That is correct, sir.

The CHAIRMAN. From April 4, or whenever, to now, what is the third or new reason that nothing has been done?

Mr. HARRIS. Well, there are two factors.

The first was the memorandum of understanding which was entered into between Congressman Levitas, Fred Fielding, and Edward Schmults in February 1983.

The CHAIRMAN. Would you explain to me what your feeling of that agreement is? What was the responsibility of those who signed it, say Congressman Levitas?

Mr. HARRIS. Well, I agreed with Congressman Molinari's characterization of it earlier. I think it placed Congressman Levitas in a position to seek to have the House of Representatives, if the language that was used in that particular paragraph of the memorandum of understanding was to purge the contempt citation, in effect.

On the condition that the documents be produced to the satisfaction of the House, and that, of course, took a period of time to accomplish.

The CHAIRMAN. Was it not that Congressman Levitas would make every effort—first of all that he would introduce a resolution and make every effort for it to pass, which means the subcommittee, the full committee, through the Rules Committee, go to the House floor, right?

Did it guarantee anything to be produced other than the introduction of the resolution and perhaps Mr. Levitas, in his subcommittee conducting hearings and getting some subcommittee action on it since he is chairman of the subcommittee?

Mr. HARRIS. No.

The CHAIRMAN. Anything beyond that?

Mr. HARRIS. No; I do not believe he had the authority to go beyond that which he did.

The CHAIRMAN. Would you feel that Mr. Levitas has at this time done everything that he agreed to do.

Mr. HARRIS. I must confess, sir, I am not certain of the status of the resolution that was introduced by Mr. Levitas at this point. It is my belief it is presently pending before your committee. What happens to it after that, I don't know.

It appears to me as though he has done everything that he agreed to.

The **Chairman**. Mr. Levitas introduced the resolution. He did get it through the subcommittee. He has written a letter to me informing me that he has introduced it or it has passed out of the subcommittee and urged me to schedule action in the full committee.

So, as far as the agreement is concerned, that can't be a reason for your holding it up now, because he has done everything he said he would do in the agreement. It is over with. If Mr. Levitas does nothing more other than harangue me, he has completed it. What other reason might there be for nothing to have been done between April 4 and now?

Mr. **Harris**. Well, I viewed the House of Representatives in this particular matter essentially as being a complainant in a criminal proceeding.

It is not at all uncommon in criminal proceedings for someone who is a complaining witness, a complaining party, later to come to us as prosecutors and say that they do not wish to go forward with the prosecution.

The **Chairman**. You put this contempt citation in exactly the same position as any other complaint you may get that you may consider?

Mr. **Harris**. No, but there are comparable features to it. Here we do have a case that the House may wish to advise me as the U.S. attorney that it does not wish the prosecution to go forward.

The **Chairman**. Based on that, you could on any contempt citation, hang around for any length of time figuring that maybe the Congress or the next Congress, or the Congress after that, might decide to tell you to forget it?

Mr. **Harris**. I would not expect that to be the case. In this particular situation, the Congress is heading in that direction and where they end up, I do not know.

The **Chairman**. How many days did you wait to see what the later mood of the Congress might be after you received the certification on the contempt citation against Rita Lavelle? Did you say 2 days?

Mr. **Harris**. Yes.

The **Chairman**. If Congress were to tell you now that they—within, what is it, a month? From the time Congress acted now? Or several weeks? That they changed their mind, you would have to tell them it is too late, but you might still be waiting now in June from something that happened in December for Congress to make its mind?

What we are getting at deeply is—and maybe I am—I will yield—we have to go back for 15 minutes for another vote, but is it not a fact that despite an action by the Congress on a contempt citation, Congress in this case has been supported by all those participants that the Congress has a responsibility to oversee the execution of the laws that it passes and therefore it needs from the executive, it needs papers, and certain things, and it passes a contempt citation in an effort to be able to fulfill its responsibility?

That an appointed official of the executive can for any reason or for no reason totally thwart the will of Congress, or put another word in other than thwart, just stop it dead in its tracks, that is what seems to have gone on.

Do you agree that that is a distinct possibility due to maybe the law being written inadequately or something?

Mr. HARRIS. Well, it certainly is not what has happened in this particular case. I think in any situation one has to limit oneself to the particular facts that are present.

I have enormous resource problems in my office. Congressman Snyder referred this morning to a hypothetical situation in which a contempt citation might have been presented to a grand jury seeking to have no true bill returned.

There are a number of things that could have been done. I could have gone through the charade, for example, of starting to present it a grand jury and then just withholding everything.

I did what I thought was the most forthright and the most proper thing to do in exercising my discretion in handling the contempt citation.

The CHAIRMAN. You put us in a difficult position in another way because you say it is still active, and you may still bring it to the grand jury. I can turn right around the other way and say to my subcommittee, I better hold off and wait on having the Congress do something because the U.S. attorney may feel very strongly one of these days that he should bring that to the grand jury, so we better not interfere with him by passing any resolution that would indicate Congress may feel otherwise.

Do you agree that that is kind of the situation we are in?

Mr. HARRIS. I don't really think so. Basically what I am seeking to do is to ascertain the wishes of Congress in this matter before making a final determination as to what should be done with this case.

The CHAIRMAN. You have had the witnesses of Congress before you for months. The statement of the past Congress is still there.

We are in the second round of a vote. We will recess for 10 to 15 minutes. Thank you very much.

[Recess.]

The CHAIRMAN. The committee will come to order.

Thank you for waiting, Mr. Harris. Suppose there never had been an agreement between the members of the subcommittee and the administration? Could you predict or would you say what the situation would be now? Would it have gone to the grand jury?

Mr. HARRIS. Of course I wasn't faced with that so I would just be guessing. It would be in the realm of the hypothetical.

The CHAIRMAN. Well, if the agreement was the reason for you to not bring it there, I guess maybe I cannot—shouldn't ask the obvious that if there were no agreement then there would.

Mr. HARRIS. That would appear to be the case.

The CHAIRMAN. Decisions on this are made totally by you?

Mr. HARRIS. I am not sure——

The CHAIRMAN. Is it your responsibility first of all?

Mr. HARRIS. Yes; that is correct.

The CHAIRMAN. But it is your responsibility, maybe you don't make the decision?

Mr. **Harris**. No; I make the decision but I have a very able group of assistant U.S. attorneys with whom I consult at various phases in various cases including this one.

The **Chairman**. Do you have any input from anybody above?

Mr. **Harris**. In this particular case, no.

The **Chairman**. How about in the *Rita Lavelle* case?

Mr. **Harris**. In that case none either.

The **Chairman**. Are you familiar with the action taken by you as exactly parallel to the wishes of the administration? Both cases? One they didn't want to go anywhere, one they wanted to go quickly? One didn't go anywhere and the other went quickly?

Mr. **Harris**. I don't know what the administration wanted to do in either case. Nothing was communicated to me at all. There was no impediment to proceeding promptly in the *Lavelle* case, so I proceeded promptly. There were conflict problems in the *Gorsuch-Burford* case and there is a resolution or a memorandum of understanding and resolution before the House which I think I have an obligation to receive before making a final decision as to what to do in this case.

The **Chairman**. Once again what is the impediment now since April 4 with the contempt citation to now? Impediment to proceed as you put it?

Mr. **Harris**. It may well be, sir, that you disagree with the manner in which I have exercised my discretion but my discretion led me to conclude that there is a valid memorandum of understanding, that memorandum of understanding has been endorsed by the Speaker of the House of Representatives, it has been passed by Congressman Levitas' subcommittee, it is before this committee.

I could not conceive of my proceeding with a prosecution at the time the House itself is considering whether to send a different message.

The **Chairman**. Suppose the House on one step of the way should state publicly that it will not proceed with that?

Mr. **Harris**. If that happens I would be guided accordingly.

The **Chairman**. What would that mean?

Mr. **Harris**. I couldn't tell you, sir, I would have to look at the facts as they existed at the time. I am not in a position to predict what will be done in a pending criminal case.

The **Chairman**. So, just before I yield here, you feel the position of U.S. attorney is one which can thwart the will of the Congress in this kind of a situation any time it wants to for any reason it may say it is the reason?

Mr. **Harris**. I do not think that at all.

I do not think that in any sense I am thwarting the will of Congress. What I am doing is pausing to heed the will of Congress as a part of making a determination of what to do in this case.

The **Chairman**. During the time that that other suit was pending, there was no change in the will of Congress at that time, was there?

Mr. **Harris**. Actually, it did occur during the pendency of the suit. The memorandum of understanding which was entered into on February 18—as incidentally I recall from Mr. Brand's testimony this morning he stated he was representing the entire House of

Representatives in assisting Congressman Levitas in arriving at that.

The CHAIRMAN. Did you mean that to imply that if Mr. Brand said he was representing the House of Representatives that he was committing the House of Representatives to an action in that agreement?

Mr. HARRIS. I do not so understand, but that was his statement. In other words, this is not—Congressman Levitas obviously is a very responsible member of this august body and certainly this is a matter being proceeded with in a very proper and careful way.

The CHAIRMAN. Do you feel the House has any obligation to follow through on the Levitas resolution?

Mr. HARRIS. I would not presume to speak for the House, sir.

The CHAIRMAN. You talk about Stanley Brand. We all know what he means being counsel for the House of Representatives, and to imply that the House of Representatives said they will do this if you do that with the administration, then to come and say, you know, being asked almost the same question to say now you don't presume to guess what that means——

Mr. HARRIS. The problem is you present me with one of these situations in which I am being asked, is the cup half empty or is the cup half full.

The CHAIRMAN. And getting the response that it is neither.

Mr. HARRIS. The response you are getting——

The CHAIRMAN. Was this discussed with your superiors as to what you were to do, saying don't bring this to the grand jury? Did anyone other than your assistants who might give advice or suggestions, did anyone above you indicate that you should not proceed with this to the grand jury at any time during this period?

Mr. HARRIS. No, sir.

The CHAIRMAN. So you yourself--now we are getting to guessing but in your own thoughts, forget the legalisms and all that—do you think it is proper to place a person in that position, the position of U.S. attorney, to be able to be instructed by the Congress to do something and yet to be able to say no for 6 months?

Mr. HARRIS. I am afraid I don't understand your question, sir.

The CHAIRMAN. The fact is, the Congress voted a contempt citation and certified it to you with the instructions that you were to present this to the grand jury and for 6 months you do not. That is what I am talking about.

Mr. HARRIS. Well, as I have been seeking to explain, what I am doing is seeking to heed the current will of Congress or to become aware of the current will of Congress before making a decision as to how to proceed further.

The CHAIRMAN. Thank you.

The gentleman from New York, Mr. Molinari.

Mr. MOLINARI. Mr. Harris, first I would like to clear up a question in my own mind. At the bottom of page 1 of your testimony you state:

> On or about December 15, 1982, the Civil Division of the Department of Justice provided my office with a draft of a complaint which would be filed in the United States District Court for the District of Columbia if a contempt citation were voted.

On page 5 you stated:

At no time has anyone in the Department of Justice given any directions whatsoever as to what he thought I should or should not do in the Burford contempt matter.

There seems to be a contradiction in my mind. Could you clear that up for me?

Mr. HARRIS. I do not see the contradiction. The decision to file the civil action was not made by me.

Mr. MOLINARI. Who did make that decision?

Mr. HARRIS. I do not know. I presume it was the Department of Justice's decision and I would doubt seriously in view of the gravity of the confrontation between the executive branch and the legislative branch in this particular situation, I would be astonished if it were not made by the Attorney General.

Mr. MOLINARI. But it was brought—in your name it was brought. Somebody signed for you as I recall in reading your testimony?

Mr. HARRIS. Actually my name was on the pleading. I did not sign it. Which is a typical thing.

Mr. MOLINARI. I understand.

The fact is that you didn't know who was responsible for making the call to bringing this civil action?

Mr. HARRIS. By making the call, you mean making the decision?

Mr. MOLINARI. Making the decision, yes.

Mr. HARRIS. I simply knew that the Department of Justice institutionally had made a decision that if a contempt citation were voted that a civil action would be brought seeking to resolve the question civilly rather than criminally.

Mr. MOLINARI. But it is your office that had to carry the ball once the determination was made to institute the civil action?

Mr. HARRIS. No, we were consulted and properly so because any time a major action is filed in a particular district courtesy dictates that the Department of Justice notify the U.S. attorney's office of the action to be brought. But the matter at all times basically was handled by the Civil Division of the Department of Justice.

Mr. MOLINARI. You say we were consulted—who consulted with whom?

Mr. HARRIS. The chief of my Civil Division, Royce C. Lamberth was advised by the Civil Division of the Department of Justice. I do not know who contacted him. We were sent a copy of the complaint roughly 1 day before it was filed.

Mr. MOLINARI. Now let's get back to the question that Mr. Howard, the chairman, raised. We are going to start from the end of your testimony.

It troubled Mr. Howard and I can understand why, you make reference to the fact that there may be a pending case. Could you explain from your position when and under what circumstances there would be a termination or there would be a justification of termination of a pending case?

Mr. HARRIS. Of this particular case?

Mr. MOLINARI. Yes, sir.

Mr. HARRIS. I do not feel I can answer that question because of the pendency of the action. Like my other lawyer, I am bound by the code of professional responsibility and as I read disciplinary rule 7-107 there are very real constraints on what I may say about a pending case.

Mr. MOLINARI. Then let's go to page 1 of your testimony.

Would I be correct in assuming that if the full Committee of Public Works and Transportation adopts the Levitas resolution as the subcommittee did and then the full House adopts it that you would take no further action in presenting this matter before a grand jury?

Mr. HARRIS. I do not at this time know what action would be taken. I would do the same thing then that I would do in any other case that progressed to the point of decision. I would consider the facts as they then existed, get together with several of my assistant U.S. attorneys and make a decision as to what should be done.

Mr. MOLINARI. Didn't you testify before that one of the reasons why you were holding up in making a decision was waiting to see what happened in this resolution?

Mr. HARRIS. Yes, sir.

Mr. MOLINARI. Well, I must confess that I am a little bit confused, confused to this extent, that before the House voted the contempt resolution Justice had already decided they were going to bring a civil action and it had started to move in that direction, am I correct?

Mr. HARRIS. Yes, sir.

Mr. MOLINARI. And in the *Lavelle* case before the House voted contempt, already a couple days before you alerted your people to get ready to present the case before the grand jury, is that correct?

Mr. HARRIS. That is correct, sir.

Mr. MOLINARI. Yet here we have a matter pending for some time, the subject of two memorandums of understanding and I quote from your statement:

> Third, the resolution introduced by Congressman Levitas which would have the equivalent effect of purging Mrs. Burford of contempt has been passed by the Investigations and Oversight Committee and is now pending before you.

Now, I interpret that, I think it is rather clear, that what you were saying is that the resolution if it is adopted by our full committee and then like the House of Representatives it is your interpretation that that would purge Mrs. Burford of contempt.

Mr. HARRIS. That would reflect that that—that is the intent of the House if that is done.

Mr. MOLINARI. I am not asking about the intent of the House, we have to ask ourselves.

I am asking you what your reaction would be. This is your testimony and it is critical. We are reaching a point that is somewhat critical to the issue before us. In reading your testimony I think this is one of the most significant aspects of it. I judge this as an interpretation by you that the resolution introduced by Congressman Levitas if enacted by the House eventually would in effect purge Mrs. Burford. That is what you are saying.

If you want to look at it and see if my interpretation is incorrect, I would be glad to hear it.

Mr. HARRIS. I have no problem with your interpretation. The difficulty I have is with making a flat prediction of a prosecutorial decision.

Mr. MOLINARI. Who will make that decision?

Mr. HARRIS. I shall.

Mr. **Molinari**. Is there anything that might cause you to change your mind? You are of the opinion that you are voicing on page 1, stating this would in effect purge Mrs. Burford and cause you to take a different course of action?

Mr. **Harris**. I do not think it would.

Mr. **Molinari**. I am happy to hear that. We have spent an awful lot of time getting to this day and I want to be sure in fairness to everybody—and let me go on, there was a question raised before by the chairman of the full committee about the *Lavelle* case and the Burford matter. I think we can draw a distinction and I would like to get your impression.

In one case we had a subpoena validly served as far as we know, and a flat refusal to appear. Then you chose to prosecute or move the prosecution forward and within a matter of days acted expeditiously. In the Burford matter, however, much to our frustration, the only time we got any cooperation from the Environmental Protection Agency, and from the administration, indeed from the White House, was when we moved with criminal contempt citation.

Then we got all kinds of cooperation.

Unfortunately, it didn't come before we had to vote and it was our judgment that the only way we were going to get it was by taking that rather strong step.

But the record would indicate several things that you call mitigating circumstances—it might have been Mr. Brand that used the term—the fact that she had a directive from the President not to release it. We had some information that seemed to come forward after the criminal contempt resolution was voted indicating that it was really her desire to release the documents. She was precluded from doing so by people in Justice Department and people in the White House.

I think that that might create a different set of facts.

The point is there is an agreement that was drafted here. I don't know whether you are prepared to answer this but I would like to ask you this question. There were a number of different committees and subcommittees that were investigating EPA. Mrs. Burford being the Administrator was the one usually called in to testify. I think that the reason the administration chose to enter into an agreement with Mr. Levitas was because of his standing in the House of Representatives and his knowledge of the issues and the general reputation that he enjoys.

Do you know if that was involved in the decisionmaking process of why they entered into this agreement with Mr. Levitas?

Mr. **Harris**. I played no part in any of that, sir.

Mr. **Molinari**. You are familiar with the memorandums?

Mr. **Harris**. Yes, sir.

Mr. **Molinari**. Would it make any difference to you, sir, in determining whether or not you were going to prosecute this case whether the recitals contained in the memorandum of understanding were contained in the whereas clauses of the resolution to be adopted or in the resolved clause?

Mr. **Harris**. I am afraid I am not enough of a parliamentarian to be able to respond to that.

Mr. Molinari. Well, I am not concerned so much about the parlimentary aspects before the House of Representatives as much as I am of what might happen if this goes before a grand jury.

We have a very complicated matter here, and I think the civil action that Justice brought in this case was the first time that that was attempted, am I correct in that assumption?

Mr. Harris. I believe that is correct. Yes, it is, sir.

Mr. Molinari. I think it would probably be a fair conclusion that based on the results of that that if we had a confrontation somewhat similar to what occurred before that I would hope Justice would not resort to that kind of strategy again. Is that a fair assumption?

Mr. Harris. Well, I think the problem we are facing here basically, and it is bedeviling all of us, is that we are dealing with a statute that was enacted in 1857 and there is no indication whatever that anyone thought as high level in the government as an administrator of the Enviromental Protection Agency would end up being cited for contempt under that 1987 statute.

Mr. Molinari. Well, what difference would that make? If you are going to hold somebody in contempt for failure to comply with the reasonable and lawful dictates of Congress, shouldn't the same laws apply whether it is a high level cabinet member or somebody less than that position?

Mr. Harris. Certainly there is no question about that, the law should apply to anybody but that simply complicated it a great deal and I don't think that the drafters of the legislation in 1857 contemplated the kind of a confrontation that occurred in this case.

Mr. Molinari. Can you tell me why?

Mr. Harris. The legislative history is not particularly revealing, but I think that my own feeling is that there they were thinking basically in terms of your lay witness, your nongovernmental witness who did not comply with the request of Congress and they wanted prompt ability to have a prosecution go against that person.

Mr. Molinari. The statute that we are talking about is not really I think a typical criminal provision. Would you agree with that assessment?

Mr. Harris. I would.

Mr. Molinari. This was really enacted according to some of the research materials that I have secured, to create an alternative to Congress' inherent contempt procedure which would be time-consuming and unwieldy to work with.

So contempt of Congress was made a misdemeanor and although prosecution was delegated to the U.S. attorney, Congress arguably did not intend to allow that official to override the decision made by the full House or Senate that criminal proceedings should be instituted against a recalcitrant witness.

This is one of the interpretations; frankly, it is one that I agree with. However, we are beyond that point. I would like to just zero in on one aspect of it because it is the one that I think we can beat history as much as we want to death but the question is where do we go from here.

I would like to see this matter moved as quickly as possible.

I think despite all the recriminations and all the wrongdoing that did occur and the impediments thrown in the laps of Congress in attempting to get on with a very important investigation, that there did reach a time when in good faith a member of this committee, a chairman of the subcommittee, Mr. Levitas, was called to the White House and entered into an agreement in February, followed by a second agreement in March.

Now, the whole purpose of that agreement, as I interpret it, was to provide for certain commitments to be made on the part of the administration giving total access to our subcommittee and members of the staff and some members of the staff.

Now, we have had a hearing of the subcommittee and there was a lot of testimony which indicated that that commitment had been made and that we were getting free and total access. So that the committee chairman, the staff, and so on, were satisfied that the agreements made on the part of the administration were adhered to.

Now, of course, my concern is that we, the Members of Congress, live up to our side of the bargain.

Mr. Howard raised a legitimate concern and that is, he is hesitant to move the resolution if in fact he felt that after we would in effect attempt to purge Mrs. Burford that you might choose to go ahead on your own and bring the matter before a grand jury.

This is a concern that he has had all along. I have been attempting to satisfy that concern frankly because I believe that Mrs. Burford can no longer control the situation; she has been out of the scene for some time. Whatever custody and control there was of the documents, she no longer has any control over. I think the spirit of fairness calls out for us to move on to attempt to do what we said in that memorandum and that is that the House should proceed to purge her.

I would like to seek from you a stronger message as to the reaction that would be taken by yourself so that the chairman, Mr. Howard, that is, can be convinced that that indeed would be the case.

Mr. HARRIS. That certainly would weigh very heavily in the decision. The House of Representatives is the moving party in this matter; they are the complainants. If they state they do not wish to have the matter prosecuted further, I think that the great likelihood is that that would be the end of the matter.

But I am limited by the extent to which I can make an absolute prediction in a pending case.

Mr. MOLINARI. Thank you, Mr. Chairman. I will yield for now.

The CHAIRMAN. Thank you.

Before I recognize the gentleman from Georgia, if the House were to pass a resolution indicating—why they have to do this, I don't know—indicating they feel as the last Congress did in December, and that they feel that the U.S. attorney should or shall bring this before the grand jury, what do you think your action, if any, would be?

Mr. HARRIS. I think then the position would be a reaffirmation and the matter would be presented to a grand jury.

The CHAIRMAN. If we had it twice it would sort of get done, what we said ought to be done the first time?

One more time saying the same thing we did before? Is that what you are saying?

Mr. HARRIS. I don't know that the House needs to do that.

The House presumably would ultimately vote on the resolution of Congressman Levitas——

The CHAIRMAN. I am not talking about that. Setting that aside totally, I am wondering what it would take to get this before the grand jury.

The grand jury will make whatever decision it wants to. Apparently a vote of the Congress overwhelmingly on contempt charges being referred to you from the Speaker was not and is not, to this point, enough; certainly it has not caused any action yet, but yet if we sort of did it again then you say that you would bring it to the grand jury.

Mr. HARRIS. I would say there is no need to do it again. I recited the factors that have caused us to postpone any definitive resolution of what to do with this matter.

The CHAIRMAN. Had there been no civil suit, no turning over the papers, no agreement by Mr. Levitas with the administration, what would you say would have happened on the contempt citation by now?

Mr. HARRIS. I do not know how far it would have proceeded because, as a practical matter, there would have been a relatively—well, rather, I think fairly unique, complex grand jury proceeding.

Undoubtedly we would long since have begun a grand jury proceeding.

The CHAIRMAN. You would have. In other words, what we are talking about is not you being successful in having her indicted or anything; is that true?

Mr. HARRIS. Yes.

The CHAIRMAN. All we are talking here is about you bringing this before the grand jury, the fact that the Congress voted a contempt citation, is that it?

Mr. HARRIS. Yes.

The CHAIRMAN. You say that would have been accomplished had there been no countersuit?

Mr. HARRIS. I am confident it would have, yes. Yes, sir.

The CHAIRMAN. And the countersuit part came and the appeal was another reason why it didn't proceed ahead.

Mr. HARRIS. Yes, sir.

The CHAIRMAN. And there has been nothing since then?

Mr. HARRIS. The memorandum of understanding, the endorsement of that memorandum of understanding by the Speaker of the House, approval of it by Congressman Levitas' subcommittee—all of those factors I think could not be ignored responsibly.

The CHAIRMAN. All right.

Is that the kind of things that changes the shall to may? I believe you said shall does not always mean shall as the average person knows it.

Mr. HARRIS. The courts have said that shall does not mean must.

The CHAIRMAN. But it may mean may?

Mr. HARRIS. Yes, sir.

The CHAIRMAN. Or it may not?

Mr. Harris. But there still is—and I think properly—is discretion within the prosecutor as to when a case is to be presented.

The Chairman. All right.

Suppose a member of Congress, who was not on the Public Works Committee or any of its subcommittees, of course, had introduced a resolution similar to that introduced by Mr. Levitas. Would that be sufficient for you to say, well, you better stop because something is pending?

Mr. Harris. You are getting into the realm of the hypothetical. Certainly the obverse of your question is the fact that Congressman Levitas was the moving party. Certainly it was critical in that he had been the initial moving party with respect to the original contempt citation. So his role in it was significant.

The Chairman. Can you answer or tell us what would happen if on next Tuesday full Committee on Public Works and Transportation votes down the Levitas resolution despite what the Speaker may have said or may not have said?

Mr. Harris. I would have to decide what to do and when.

The Chairman. You always have to decide. What do you think you would decide, if you don't know what you would decide, can you think what you would decide?

We won't hold you to it.

Mr. Harris. The difficulty is, I would love to be responsive and if I came back after this entire proceeding is over, I would be delighted to answer every question, but you are getting to the question of what I will do with a pending criminal case.

I do not feel I can be specific in answering that question.

The Chairman. We are never assured that any vote of contempt of Congress will ever get to the grand jury. Would you say that? Is that broad enough for you?

I said we could not be sure. That ought to leave plenty of leeway.

Mr. Harris. Well, an infinite number of cases could arise. I would think that the House could be certain that essentially all would get to the grand jury.

The Chairman. Would you say if you don't have the right that your office has the power to stop any and all contempt citations, not necessarily the right, but you have the power?

Mr. Harris. Yes, I would say so.

The Chairman. There it is. So you really can judge over the Congress of the United States?

All we are doing is throwing something to you and hope you agree with us?

Mr. Harris. No, I think that is an overstatement.

You simply asked as to the power.

The Chairman. Yes.

Mr. Harris. If something were to be presented to the U.S. attorney who so abused his discretion in not presenting it to a grand jury, there would always be impeachment or mandamus remedies that could be initiated against him.

The Chairman. We presume that to be the case right now.

Mr. Harris. I am talking about responsible functioning.

The Chairman. Yes. So they do have the power?

Mr. Harris. Yes.

The CHAIRMAN. The Chair recognizes the gentleman from Georgia, Mr. Levitas.

Mr. LEVITAS. Thank you, Mr. Chairman.

Mr. Harris, at what point did you make the decision not to present the contempt to the grand jury?

Mr. HARRIS. Well, it has been a continuing decision——

Mr. LEVITAS. When did you first make the decision?

Mr. HARRIS. The first decision, sir, was made on December 21, when I concluded that I was in an intolerable conflict as a consequence of the civil suit, and, as you know, I wanted to communicate that to the Speaker and to the House as promptly as possible and so I wrote a letter to that effect on December 27.

Mr. LEVITAS. It seems to me that you had to realize you were in, as you say, an impossible position of conflict, at least on December 15 even before the House acted. As I read your testimony, you state that on December 15 you examined a draft of the pleadings which had been prepared by the Civil Division of the Department of Justice seeking to at that time enjoin, seek declaratory relief against the possible House contempt action.

You not only had your name on the pleadings, but you actually, as you say, read the draft and made a number of editorial suggestions.

Wasn't the obvious conflict apparent at that time?

Mr. HARRIS. I would say you are very likely to be correct. I couldn't pin it down to exactly on which day I came to that conclusion.

Mr. LEVITAS. Prior to receiving a draft of this complaint from the Justice Department, had you had any discussions with anyone in the Justice Department concerning the possible contempt of action by the House in the Gorsuch matter?

Mr. HARRIS. I had not.

Mr. LEVITAS. So your first discussion or involvement with anyone at Justice was when you received the drafts of the complaint December 15?

Mr. HARRIS. I feel absolutely confident that that is correct.

Mr. LEVITAS. Now, I am going to get ahead of myself a little bit because in light of the answers to the chairman's questions, I am for the first time somewhat confused about your position on the matter.

Up until this point, while I totally disagree with your position, at least I felt I understood your position. Now I am in doubt.

You have indicated today that the likelihood or the possibility exists that there are circumstances in which you might still present the Gorsuch contempt matter to the grand jury.

Mr. HARRIS. What I have done, sir, is to say that I do not feel it is proper for me to make an absolute prediction of a prosecutorial decision based upon facts which do not now exist.

Mr. LEVITAS. Let me take the other side of the coin. You cannot say today definitely that you would not present the Gorsuch matter to the grand jury for its action?

Mr. HARRIS. I think it would be—when you say present it to the grand jury, present it to the grand jury for what purpose? For example, if the House of Representatives votes in effect to purge her although we will use that recognizing there are technical problems with the term purge, and if, query, let's suppose for purposes of your question that a decision is made, all right, this matter is not to be proceeded with further.

Then there are two choices if you make that assumption.

One, is to present the original contempt citation and the subsequent resolution of yours to the grand jury in which case it would be literally incredible for the grand jury to return an indictment.

The other alternative, assuming that hypothesis, would be to say, is there any point in going through this meaningless discretionary act?

Mr. LEVITAS. My question, however, and I agree with what you just said, but you are getting away from the question I am asking.

You cannot, based on what you have said so far, tell us today you will not present the Gorsuch contempt certification to the grand jury? That there are no circumstances under which you would not present it?

Mr. HARRIS. I am sorry.

Mr. LEVITAS. There may be circumstances under which you would present it. There may be circumstances under which you would present the Gorsuch contempt matter to a grand jury. Is that right?

Mr. HARRIS. I am sorry. You are losing me ever so slightly. The likelihood of prosecuting here if the House does not desire to have her prosecuted——

Mr. LEVITAS. I am not asking that.

If you will take the scenario that Mr. Howard gave you, that the House of Representatives rejects House Resolution 180 which I have introduced and indeed adopts a resolution saying that we reaffirm the position taken in the last Congress calling for the prosecution of Mrs. Gorsuch——

Mr. HARRIS. Sorry, I misunderstood you.

In that case, I think it would be my obligation to present the case to the grand jury.

Mr. LEVITAS. That gets me to the problems, one of the problems I have.

Mr. Olson, Ted Olson, Assistant Attorney General, Office of Legal Counsel, testified under oath before my subcommittee the day Mrs. Gorsuch appeared, but refused to provide us with the documents we requested, and, having some concern about the potential conflict I asked Mr. Olson, I said:

> As I understand it, the fact that you have advised Mrs. Gorsuch concerning the matter and the Attorney General has, and your participation in these proceedings today would not prevent the Justice Department from discharging its statutory responsibilities under the congressional criminal contempt statute if that should—which we hope it would not—eventuate.

Mr. Olson said:

> We don't believe anything we have done to date or intend to do at this hearing would jeopardize the ability of the Attorney General to discharge his responsibilities under the Constitution and laws of the land.

Now, in the brief in support of the position filed in the district court in the civil action, page 37, there are some very interesting statements which relate to your statement just now.

In the text it says the witness in this case, Mrs. Gorsuch, was cited for contempt for withholding documents at the direction of the President upon advice of the Attorney General.

Under these circumstances, it is questionable whether the Department of Justice can properly prosecute Mrs. Gorsuch for contempt.

Footnote: Since the Attorney General counseled the President to instruct Mrs. Gorsuch to withhold the documents in question, it would also raise serious ethical questions for the Department of Justice to undertake a discretionary prosecution.

Again, finally, the criminal prosecution of an executive official for complying in good faith with the President's instructions to withhold documents could well be unconstitutional in any event.

Now, given those statements, and your name appears on those papers, how can you say to Mr. Howard today that you would present it to the grand jury?

Mr. HARRIS. I had not been aware of the specific nature of those statements and I am just not in a position to answer that question. But I thank you for raising it.

Mr. LEVITAS. You see the problem, and the fact of the matter is Mr. Olson should have seen the problem when he was first asked that question because there were things he should have done and you should have done on December 15, I think.

What significance do you attach to Judge Smith's statement in his opinion, in construing the congressional contempt statute, that the U.S. attorney is required to present the matter to the grand jury?

Now, required goes beyond shall. Required, I don't think you would interpret required to mean in your discretion if a judge said, "Mr. Harris, you are required to do something," I take it you would do what he required you to do?

Mr. HARRIS. Yes, sir.

Mr. LEVITAS. So when he says in his opinion—I am sure you are familiar with it—that the U.S. attorney is then—that means delivers the contempt citation to the appropriate U.S. attorney—the U.S. attorney is then required to bring the matter before the grand jury.

How do you interpret that? I take it that that is a statement that questions whether there is any prosecutorial discretion in a matter of this sort.

How do you respond to that?

Mr. HARRIS. I don't believe that Judge Smith was intending any particular meaning to that. I think he simply characterized the statute in that fashion in a descriptive way as part of his opinion. That particular point was not at issue.

Mr. LEVITAS. The question that you raise on page 2 of your testimony in the next to the last paragraph, you say:

> The contempt statute is like any other criminal statute passed by Congress, once the matter is referred to the United States Attorney the status of Congress is akin to that of any complainant in any other criminal case.

I confess I am not that totally familiar with the entire criminal code, but can you give me at this time any references to criminal statutes which have in their text a statement where a complainant calls the matter to the attention of the U.S. attorney, the U.S. attorney shall present the matter to the grand jury?

Mr. HARRIS. I could not off the top of my head, sir. I'm sorry. What we are dealing with here is a separation of powers problem under the Constitution. If there were no prosecutorial discretion vested in the prosecutor, then in effect it would be the legislature which would be determining who would be prosecuted. There would be no filter between the legislative determination that someone should be cited for contempt and the judicial proceeding in which guilt or innocence were to be determined.

Mr. LEVITAS. You are suggesting this be in the nature of a bill of attainder. But a bill of attainder—where the legislative branch would attempt to pass a bill of attainder it seems to me is not only a reference to the grand jury, it is a conviction. Here, as I read this statute, it certainly calls upon the U.S. attorney to present the matter and then leaves it up to the judicial process, the grand jury, petty jury, and so forth.

What I am saying is because your testimony struck me there, I have tried for several months now to find some statute that is like this statute, and thus far I have not been able to do so. That doesn't mean it doesn't exist. Gosh knows, it is like the Bible, anything can be in there if we just look hard enough. But I don't know of any other statute which says when a certain action is taken by Congress the U.S. attorney shall present the matter to a grand jury.

I was just trying to—if you desire, you can submit it for the record. I would just like to have some help in that regard. I think this statute is difficult. But as of this moment you know of no other statute?

Mr. HARRIS. No; as I look at the sentence, perhaps it could have been crafted more artfully. I wrote this statement on the first day of my vacation on Tuesday and then came back yesterday to appear before you, so it was done with some haste.

What I intended basically to convey there is that once the contempt citation has been conveyed to the U.S. attorney, then the House of Representatives is in the posture of a complainant, as a complainant would be in another proceeding. Perhaps my analogizing to another statute was overly broad.

Mr. LEVITAS. I had intended to ask this question under any circumstance, but with or without that sentence in your testimony, I think the very fact that this statute is, so far as I am aware, unique in terms of the duty imposed on the U.S. attorney it's for that reason that I personally totally reject—whether from your position or that of the Attorney General of the United States—the theory that there is prosecutorial discretion in this matter, that it's a ministerial duty of the U.S. attorney.

Let me move to another point that I think is very important. You would agree that prosecutorial discretion must have some bounds to it. Can it be just an arbitrary act on the part of the prosecutor?

Mr. HARRIS. Certainly not, sir.

Mr. LEVITAS. What were the elements in this matter? I think you referred to them earlier but if I—I was not in the room, but what caused you to exercise your discretion in this case? One had to do with the filing of the civil action?

Mr. **Harris**. That is correct.

Mr. **Levitas**. Was there any other?

Mr. **Harris**. Well, when the civil action was dismissed by Judge Smith, there remained a period in which an appeal could have been taken. No such appeal was taken. During the pendency of that appeal period you and Messrs. Fielding and Schmults entered into the memorandum of understanding, which was a little bit like someone watching the smoke come out of the Vatican, and for me to have ignored that would have been unwise.

I might call your attention to the case of *Buckley* v. *Valeo,* which is 591 F. 2d, 821, 1975, an opinion in the D.C. Circuit which held that shall language in a particular statute, granted not a criminal statute, did not compel the filing of an action.

Mr. **Levitas**. I am familiar with *Buckley* v. *Valeo.* That case was appealed to the Supreme Court, as a matter of fact.

Mr. **Harris**. That is correct, sir.

Mr. **Levitas**. I will stipulate that if you go to your library and go to that set of volumes called Words and Phrases and look up the word, shall, you will find page after page after page of different courts' interpretations of the word, and there are cases where the word shall means discretion, in other cases where the word shall means discretion, in other cases where the word shall means directive. I will stipulate to that. The question is, what does it mean in this case?

That is where I was directing my concern.

Mr. **Harris**. I don't mean to be misunderstood in answering your questions or in answering that of the chairman's. When you are talking about purely a matter of power, that is quite different from having someone arbitrarily minimize the significance of a contempt citation.

I think that in 9,999 cases out of 10,000 it would be routinely presented to the grand jury. We happened to have a very unique case here. I feel a little bit as though I am a nonvolunteer player in a play called—well, "Is It Half Empty Or Half Full?" subtitled, "The U.S. Attorney Is Damned If He Does and Damned If He Doesn't."

Mr. **Levitas**. I think you are one of the nominees for the "Between a Rock and a Hard Place Award of the Year," of the decade.

Mrs. Gorsuch is probably in the same position. I said to her the day she testified right where you are sitting, that I have a feeling that the matter is bigger than both of us. And I am not personalizing this matter with you or with Mrs. Gorsuch, but there are the most monumental constitutional issues at stake here.

You say one interpretation of your dialog in colloquy with the chairman, one interpretation is that Congress does not possess—except through its inherent power to punish for contempt—any means to legislate presenting a matter of contempt to the judicial system, which was the very purpose of this legislation, that the U.S. attorney can in fact intervene in that process.

And since the reason we have sanctions in the law to require people to do things under penalty of punishment for failing to do so, if an individual knows they will not be subjected to that sanction because anytime the executive branch even asserts executive privilege, that the U.S. attorney would ethically be precluded or institutionally be precluded enough to undercut the entire system. That is really what is at stake in part of this.

You said earlier the fact that Mrs. Burford, in her capacity as Administrator of the EPA, was a Cabinet-level official, also played a role in this exercise which you consider to be prosecutorial discretion.

Mr. Harris. That is not what I intended to convey. What I intended to convey is that that is one of the factors that makes this case unique. It certainly did not play a role in my decision. The conflict could have existed through someone else. It did not happen to exist through someone else, it happened to exist through her.

Mr. Levitas. I am glad you clarified that because, as I read the congressional legislative history of this, at the time this matter was being debated in the Congress, and it was debated very extensively, one of the proponents, one of the people who debated this makes this observation. He said the bill proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House.

So I guess we could invoke the Magna Carta, or Roy Cook, or whatever, that no one is above the law, and I hope you agree with that.

Mr. Harris. Yes, sir, by all means.

Mr. Levitas. Now let say, you have testified that at no time prior to December 15 did you have any discussion with anyone in the Justice Department about the prosecution or nonprosecution of Mrs. Gorsuch. Subsequent to December 15, other than the statements contained in papers to which your name is appended, did you have any discussion with anyone in the Justice Department concerning the exercise of your—what you conceived to be your prosecutorial discretion?

Mr. Harris. None whatever, with the exception of the one to which I referred in my statement, and that is on December 22, 1982, I did call Assistant Attorney General McGrath to tell him that I considered the statute to put the albatross around my neck and that it was not a departmental problem and that I want to write a letter to the Speaker.

Mr. Levitas. The rest of——

Mr. Harris. There was nothing more in that conversation other than that declaratory comment by me.

Mr. Snyder. Would the gentleman yield on that?

Mr. Levitas. I would be happy to yield.

Mr. Snyder. I have always been under the impression—maybe you can correct me, Mr. Harris—that there is a standard procedure within Justice when a "politically sensitive person" is alleged to have committed a wrongdoing, and that the local district attorney makes a recommendation to Justice at Washington as to whether or not he believes that indictment should be sought, a decision is made at that level in regard to those kinds of cases.

As a matter of fact, while I always had that impression, I have seen it in print within the past 2 weeks in regard to a grand jury meeting in Lexington, KY, where the prosecutor had said in open court that he wanted to seek an indictment against a former Governor, but that when the facts were submitted to Washington he was overruled.

Am I in error?

Mr. **Harris**. I believe you are correct, sir.

Mr. **Snyder**. Well, was not Mrs. Burford a politically sensitive person?

Mr. **Harris**. I was not seeking an indictment. When everybody in Washington was essentially aware of the proceedings as they wee going forth, there was no burden on my part to communicate with the Department of Justice with respect to the case.

Mr. **Snyder**. Only if you had decided that you would seek the indictment would you have followed that procedure?

Mr. **Harris**. Had this been—here again, I accept Congressman Levitas' expertise in recognizing the unique nature of this particular statute. I think that the policy that you are talking about is one in which a grand jury original, say brought by a U.S. attorney in some district and the Department of Justice would be notified of it.

Mr. **Snyder**. I thank the gentleman for yielding on that point.

Mr. **Levitas**. Thank you.

I just have a few more questions. But this point is so important, as I said earlier, and historic, that we need to get the record very clear.

You find yourself in your capacity as U.S. attorney, as I have indicated, in a very difficult position. Your name is appended to papers that suggest there is no way in which Congress can bring a contempt action against an executive branch official. Then on the other hand you say in your position as an attorney and in light of legislative history that clearly that is not the case.

In the complaint which you were given access to and made some editorial changes in, I noted that one of the prayers in that complaint calls for the court to declare that section 194 of title II cannot be constitutionally invoked against an executive official.

I find that almost an incredible statement. That means a GS-4 at the National Commission on Standards could not be held incontempt of Congress under this statute constitutionally. Do you really share that view Mr. Harris?

Mr. **Harris**. I have not studied it. As you outline it. I would tend to feel as you do.

Mr. **Levitas**. Earlier when Mr. Brand was testifying, I asked him about the statement in your letter to the Speaker which says, just before the end of the letter, "Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy."

What were you attempting to communicate there? That that civil action ought to be determinative of the matter?

Mr. **Harris**. I think that would have been desirable. At the time tthat the action was filed, it was one of those cases in which I think some Federal district court judges around the country would have accepted jurisdiction over the case and gotten into the merits of it. I am well familiar with Judge Smith, and my belief was that he would dismiss the case, and he did.

Mr. LEVITAS. Did the Justice Department ask your advice as to the civil action other than making editorial comments on the papers?

Mr. HARRIS. No, sir. Because of its significance and because it was going to be filed over my name and in my district, as a courtesy they provided me with a copy to read in advance. That was my only input.

Mr. LEVITAS. Are you concerned that the failure to prosecute Mrs. Gorsuch or to bring the matter to the grand jury's attention in the case of Mrs. Gorsuch and the presentation of the matter to the grand jury in the case of Mrs. Lavelle in matters arising out of the same general proceedings, congressional investigation of EPA, tha there is any risk of engaging in selective prosecution?

Mr. HARRIS. I do not.

Mr. LEVITAS. Have you considered that?

Mr. HARRIS. I would not say that I have considered it with any degee of care, but my off-the-cuff reaction is I do not see any problem there. The reasons for delay in the Burford case are in my view quite valid. I recognize there is room for disagreement in that. It is very rare that any group will agree on anything totally. I believe I have done what is correct.

Mr. LEVITAS. As I said earlier, for reasons that go beyond you, they go to the system, and in my judgment, we are not through with that examination yet, but the U.S. attorney is placed in a very awkward position. The people at the Department of Justice are telling him as these papers tell him, they may not have called you up on the phone, but they gave you papers that said in effect don't prosecute Mrs. Gorsuch on the one hand; on the other hand, you are looking at the Congress of the United States saying under a statute that says you shall present something to the grand jury telling you to do it.

Now, what happens if Congress amends the present law and instead of using the word shall for the eight or ninth time in that paragraph, when it gets to the point of the duties of the U.S. attorney said "and the U.S. Attorney, upon receipt of the certification of contempt from the President or the Speaker, as the case may be, is required to present that matter to the grand jury for its action."

Would that change your perception of your role?

Mr. HARRIS. If I could go back a minute. You referred to the language in the pleading as sending me a message when I read it. No. 1, I never did read it.

Mr. LEVITAS. You did not read the pleading?

Mr. HARRIS. I had not read that brief.

Mr. LEVITAS. No; the pleading, the complaint.

Mr. HARRIS. The complaint I read, yes, but I thought you were talking about the brief with the language that there was an ethical problem in prosecuting.

Mr. LEVITAS. That was in the brief.

Mr. HARRIS. That I never did read. I never, hence, read it as a message not to prosecute Ann Gorsuch. I never read anything as a message not to prosecute her. It is these other factors that caused the time to pass. The statute does not say when someone had to be proceeded against, and we have very unique factors here.

Mr. LEVITAS. Do you accept the fact that Congress, if it acted with adequate precision, could by legislation remove the right, if it existed, of prosecutorial discretion in certain cases?

Mr. HARRIS. I am not sure that that could be done constitutionally. I don't profess to have studied the question as carefully as you, though, sir.

Mr. LEVITAS. I certainly have not studied it carefully, but I do call to your attention a treatise by Yale Kamisar, "Modern Criminal Procedure," in which in chapter 14 he discusses the decision whether to prosecute and while he acknowledges the doctrine of prosecutorial discretion—as we all recognize—and the limits thereon, he goes on to say that "No one could seriously contend that prosecutor's contention could be eliminated by penal reform." And there are some treatises on this same subject.

What I am suggesting to you is I think in this particular case, in this statute as presently drawn—and certainly as may hereafter be written—Congress can say to the U.S. attorney when a certain event occurs, "You will deliver the results of that action to a grand jury and let them decide what to do with it." That is what I am suggesting.

And the difference that you have, apparently the Attorney General has, too, is that you don't read the law that way at the present time. Is that fair?

Mr. HARRIS. That is correct, although it would certainly be an extraordinary case indeed in which the U.S. attorney did not present a contempt citation to a grand jury.

Mr. LEVITAS. Mr. Chairman, I appreciate your indulgence. I have some more questions, but out of consideration for my colleagues, I will yield back at this time and will wrap up later.

Thank you.

The CHAIRMAN. The gentleman from Wisconsin.

Mr. MOODY. Mr. Harris, your position is that it is a constitutional separation of powers issue that underpins your statement, that discretion is always there to prosecute or not?

Mr. HARRIS. Yes, sir.

Mr. MOODY. Isn't it a very strong argument however, that while that may be true with the general administration of justice, certainly the administrative and executive branch functions, that in this case the House is writing a statute to protect itself, that it has its own narrow self interest at stake here, namely the timely and adequate receipt of documents it may need to carry out its business as charged under the Constitution, and that we cannot let the executive branch frustrate that process? Therefore, in this particular case under the circumstances of the House needing its own information, isn't it appropriate that the administrative branch not have that discretion to frustrate the House?

Mr. HARRIS. You have expressed a very valid concern and one which I recognize as a very serious problem.

Mr. MOODY. I am making the case that this is different from the ordinary administration of justice in specific areas. The House has a need, and it must protect that need. It cannot delegate execution of that matter to the other banch of government, or else itself delegate its power to the executive branch. Do I make myself clear?

Mr. **Harris**. Yes, sir, I understand your concern. However, as I read the legislative history of section 194, the Congress was concerned about the rights of someone who might be accused of being in contempt of Congress, and the Congress was concerned about being both the accuser and person who decided the contempt, and did wish to have another body make the determination.

Mr. **Moody**. But that body, it seems to me, is the judicial branch. Once you have executed your function of bringing it to the attention of the grand jury, then you are not the accuser either, you are not the full determinant. It is a matter of being carried out in the courts. You provide a ministerial function. That is not inconsistent with Congress quite legitimately being concerned that it did not have star chamber powers which can make it the accuser and the finder of fault and guilt?

So I don't see that that response vitiates my point. Would you care to comment on that?

Mr. **Harris**. I am sorry, if you——

Mr. **Moody**. I am responding to your comment. The fact that the ball is tossed to the judiciary branch means the Congress does not have determination of guilt.

Mr. **Harris**. It is a very difficult problem.

Mr. **Moody**. All we are asking is that you deliver a citation. The grand jury may return no true bill whatsoever.

Mr. **Harris**. A grand jury proceeding is considerably more involved than that. The Rita Lavelle proceeding was a relatively simple one. The presentation of the *Burford* case, should it go to the grand jury, and this depends in significant part on what the House does with Congressman Levitas' resolution, would be more complex. It is not simply a matter of just delivering a citation.

Mr. **Moody**. What you do with it would depend on the factual context, of course.

Mr. **Harris**. Yes, sir.

Mr. **Moody**. I am not a lawyer, I am just trying to make the case that this is generically different from the administration of justice because the House has to protect its own ability to secure documents and papers.

Mr. **Harris**. I appreciate that concern, and I think it is a valid one.

Mr. **Moody**. On another point, you cite a conflict of interest as the reasons for delay and possible nonexecution of the citation.

Mr. **Harris**. The conflict of interest no longer exists.

Mr. **Moody**. Exactly. You say it could have continued to exist but it has been mooted by the civil court. For a while it did exist, however, and that was one of your reasons for citing a delay. If the executive branch is itself the frustrator of Congress seeking documents, then couldn't the exceutive branch always put this problem in a grid lock by filing a civil suit just as it did in this case? That interpretation means the executive branch may have the ability to lock you or anyone in your job up, to freeze you by filing that kind of civil proceeding.

Mr. **Harris**. Only for a finite period of time, however.

Mr. **Moody**. But sometimes time is important.

Mr. **Harris**. Yes, sir.

Mr. MOODY. So the perpetrator of the undesirable action in this case has the ability to frustrate the remedy of the action under your reasoning of conflict of interest; at least for a period of time which can be crucial.

Mr. HARRIS. That is correct, sir.

Mr. MOODY. That seems to be inherently wrong, inappropriate.

Mr. HARRIS. This case is giving us all the opportunity to focus on very difficult constitutional questions.

Mr. MOODY. It seems to me that you use your discretion not to perform the ministerial function, but in a way that is circular reasoning. If it is truly ministerial, then you are not in a conflict of interest. Do you follow my reasoning?

Mr. HARRIS. Yes, sir.

Mr. MOODY. If it is purely ministerial and therefore not discretionary, it is not a conflict of interest. You are arguing that since it is discretionary, it is a conflict of interest and I will not perform the action.

But if you were to start from the counter assumption, that it was a ministerial function, as I and several of us read section 194, then it is not a conflict of interest. You have to perform your delivery function or your presentation function, and it doesn't become a discretionary act. Therefore, the conflict of interest issue does not arise.

Mr. HARRIS. I fully understand your position, but I respectfully have the other view.

Mr. MOODY. Last, the question of one Congress purging another. You were here when Mr. Brand was before us.

Mr. HARRIS. Yes, sir.

Mr. MOODY. You heard the discussion about that. There are 80 some new Members in Congress today who were not present at the time that contempt was voted. Conversely, there were 80 some Members then who are no longer here.

If there was a crime, if that is the right word, perpetrated against that House and not against this House——

Mr. SNYDER. Would the gentleman yield?

Mr. MOODY. Certainly.

Mr. SNYDER. I understand what you are saying, but I think it is against the institution. It is the same Congress of the United States even though it has different participants. That is where I have disagreement with Mr. Brand's interpretation, which I think is in line with where you are going. I think the contempt is against the institution, as we talked of the Office of the Presidency, you know, as opposed to the person holding it.

I think there is an argument on the other side, but I just wanted to get that in there in that context.

Mr. MOODY. I think the gentleman is entirely appropriate making that point.

As for your reaction to the purging: Do you feel that one House can always purge the offense made against an earlier House?

Mr. HARRIS. I tend to feel that probably as a purely technical matter that it could not be full purging However, I agree with Congressman Snyder, that if the offense essentially is against the institution, and if the institution wishes to express, as has been proposed by Congressman Levitas, that prosecution not go forward that that would, I think, be virtually dispositive.

Mr. MOODY. You say in your statement that this akin to any other complaint in any other criminal case. We have commented on that in many respects, but I have one last question, as analogy so to speak, that I offer for your comments. If you were involved with a kidnaping and you were prosecuting a kidnaping, and the kidnaper was negotiating the return of the victim to the family, you would not necessarily withhold your indictment, right?

Mr. HARRIS. I believe that is correct.

Mr. MOODY. Someone made the analogy earlier of the bank robbery, that if a robber returned the money, you would not withhold the indictment because he had made whole the complainant. Regarding the *Burford* case, the fact they made the documents available negotiated with Mr. Levitas' subcommittee to make the documents available, that doesn't by itself, it seems to me, vitiate the initial offense to Congress.

That is just a rather minor footnote of what I have been driving at, but I wanted your comments.

Mr. HARRIS. Well, Mrs. Burford happended to hold a particular job at a particular time, and she—to go back to Congressman Levitas' characterization—found herself between a rock and a hard place. I view her transgression, assuming it to be such, as quite different from a kidnaping or armed robbery or something of that nature.

What happened here, once the civil suit was dismissed, is that the parties, led by Congressman Levitas, followed the suggestion of the district court Judge and did pursue it as "Cannot some sort of civil settlement be worked out so we don't have to go into the criminal area in order to determine these constitutional problems?"

Mr. MOODY. Thank you for your comments. If you have any written response to my lead-off question; namely, doesn't the House have the right to protect itself and, therefore, cannot delegate that authority to the executive branch? If any research sheds light on this I would appreciate hearing of it.

Mr. HARRIS. Very well.

Mr. MOODY. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Kentucky.

Mr. SNYDER. Let me say I take issue with Mr. Harris' and Mr. Levitas' description of Mrs. Burford as being between a rock and a hard place. We have an expression back home that I think more appropriately says where she was, and that is between the dog and the fire plug.

Mr. Harris, I think Mr. Levitas—and I think you sort of conceded with me—about your comment about this being a normal criminal case. There is some merit to the fact that this statute is sort of unique in itself. I believe that you came to that more or less conclusion with him, that it is a little different than most of them.

I preface with that observation because I am concerned with Mr. Brand's opinion this morning that—maybe purge is not the right word—but that the Congress cannot do away with this unfortunate situation. We will use the word purge realizing perhaps it is a convenient word, but maybe not descriptive.

A quick look at the cases which he cited which are also referenced in Deschler's, the part I read to him this morning, they deal with the action of the witness, to wit, the proposed defendant in a case, and their inability to purge as a defense in the criminal contempt.

But I have not been able to find anything—staff has not—that deals with the action of the Congress in doing away with what they have done, and in reading this observation in Deschler's it says.

> As the following precedents reveal, a witness may be purged of or freed from contempt under procedures parallel to those used in citing for contempt"—which I assume is passage of the resolution—" submission of a report of the committee and approval of a resolution authorizing the Speaker to notify the U.S. Attorney to drop the prosecution.

Do you know of any precedents that would indicate that Congress could not do what Deschler's precedents indicates, and that that would not be sufficient for the purging or freeing of that witness?

Mr. HARRIS. I know of none.

I believe your observations are quite valid.

Mr. SNYDER. Thank you. I did want to ask you because of your allegation of conflict of interest, and I use the word allegation because I neither agree with nor dissent from that.

But my understanding is that at some point Justice had made a decision to withdraw legal support from Mrs. Burford and that her representation for quite some time has been at her own expense. Am I correct in that?

Mr. HARRIS. I do not know the answer to that but I believe you are correct.

Mr. SNYDER. You don't know whether Justice has withdrawn legal support for her?

Mr. HARRIS. It is my understanding that that was done but my personal knowledge is——

Mr. SNYDER. So I assume you took no part in that decision?

Mr. HARRIS. That is correct.

Mr. SNYDER. If in fact that decision has been made, which I assume that it has.

Mr. HARRIS. That is correct.

Mr. SNYDER. I don't believe I have any other questions, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you.

Mr. Harris, we wish to thank you for your presence here today.

Mr. LEVITAS. Mr. Chairman, I have a few more questions.

The CHAIRMAN. Go ahead. The gentleman from Georgia.

Mr. LEVITAS. Mr. Harris, I asked you whether you had any contacts with the Justice Department or the White House. I believe your testimony said neither with the Justice Department nor the White House, other than the pleadings we referred to, your name appearing on the papers that were filed in support of the Justice Department's position, and the discussion with Mr. McGrath concerning the letter to the Speaker of the House?

Mr. HARRIS. That is correct, sir.

Mr. LEVITAS. To your knowledge, did any of your associates and assistants, U.S. attorneys, have any such contacts of discussions with anyone in the Justice Department or the White House concerning these matters, to your knowledge?

Mr. HARRIS. I know that there were several meetings at the Civil Division at the Department of Justice concerning the civil case. Either Royce Lamberth, Chief of the Civil Division, or Craig Lawrence, Deputy Chief of the Civil Division, did attend a couple of those meetings simply so that our office as the office in this district was aware of what was happening.

Mr. LEVITAS. Did they—your colleagues, did they report to you as to any matters pertaining to the exercise of your prosecutorial discretion that evolved from those meetings?

Mr. HARRIS. They did not.

Mr. LEVITAS. Could you as the U.S. attorney, when presented with a copy of these pleadings, have said to the Justice Department:

> Look, I am not going to be party to these proceedings. Don't put my name on there because, as I see what's developing, it could very well be that I am going to receive a certification of contempt from the Speaker and I will then be in a position of having been a named party representing the government in the civil action declaring it unconstitutional, and on the other hand be called upon to do it?

Could you have simply said, "I am not going to do that"?

Mr. HARRIS. I would say, no, sir, and the principal reason is that the United States Code makes it mandatory that any action be brought in the name of the U.S. attorney.

Mr. LEVITAS. Does it say shall?

Mr. HARRIS. I suppose the only alternative to the shall there, if it indeed says that, is to resign if some pleading happened to be one with which I had such total disagreement.

Mr. LEVITAS. I understand that and I don't minimize that. You see, I felt all along the line that in the case of Mrs. Gorsuch, whom I think was in some way victimized, that she, a lawyer herself, might very well resign. It is not unprecedented. In fact, as I recall, the present administrator of the Environmental Protection Agency took just that course of action, as did the then attorney general when called upon to do something that they felt was inappropriate. So, therefore, it just seems to me that there comes a time where all of us as public officials have to make that decision.

In fact, at one point it even ran through my mind that the Justice Department may have, in fact, gotten you on these pleadings and your name on this brief in order to preclude you from bringing the contempt to the grand jury because of the conflict of interest.

Mr. HARRIS. I am confident that that is not the case. I received no such indication and with the statute requiring that my name be on the pleading and with this over 100-year-old contempt statute they simply did not go together.

Mr. LEVITAS. When Mr. Fielding and Mr. Schmults and I were engaged in our negotiations, were you consulted by the Justice Department in any way, or anyone else in the administration, concerning those negotiations?

Mr. HARRIS. I was not. I wished them well, however.

Mr. LEVITAS. The point that Congressman Moody was pursuing with you is a very interesting point. Congress, in passing the congressional contempt statute, clearly was seeking a means of avoiding using the inherent power of Congress which can be used, can still be used, on the theory that it makes us prosecutor, judge, and jailer all at the same time, and felt it was a fairer approach.

I am advised that it was a result of holding a reporter in contempt of Congress back in those days who had been held in contempt of Congress under its inherent powers and Congress felt that it was unseemly to do this and wanted to use a more orderly procedure.

But, where the executive branch is involved as the object of the contempt as has occurred in the past, in fact I think a U.S. attorney was once held in contempt—*Marshall* v. *Gordon*—the problem arises, is that Congress wants the Judiciary to make the decision to make it appear more impartial and fairer.

Yet, when the executive branch is involved by your claiming to have prosecutorial discretion what we are doing is, if you are correct—which I am satisfied you are not—you are filtering back that process through the very department, branch of the Government that is the object of the congressional action.

It is not being referred to the Judiciary if you are correct. It is being referred to the executive branch to decide whether to refer it to the Judiciary.

That is why I am convinced where it reads uniquely, "The U.S. attorney shall present the matter to the grand jury for its action," was intending that since you happen to occupy the generally same premise as the grand jury, your responsibility is to take it, give it to them and let them do as they will.

Mr. HARRIS. Which was done in the *Lavelle* case with great dispatch.

Mr. LEVITAS. Well, I have no further questions, Mr. Chairman. I have been very interested in Mr. Harris' testimony today. I am sure it comes as no shock to you, Mr. Chairman, that even having heard Mr. Harris' explanation of his interpretation of this that it in no way changes my interpretation of it. I am absolutely convinced that that statute, as it was written back in 1857, was specifically crafted to take care of this situation and not let the executive branch, through the Justice Department or U.S. attorney, preclude Congress from getting this matter into the hands of the grand jury where impartial decisions could be made for someone who would withhold matters from the Congress that were subpoenaed and where whatever devices that individual might have could properly be raised.

But I guess we will have to pursue the matter further on our own at this point, Mr. Chairman, and I thank you for permitting me to ask these questions.

The CHAIRMAN. The gentleman from Kentucky.

Mr. SNYDER. I was just interested in your response to Mr. Levitas when you got the complaint from Justice that you really had no option if in fact you saw a conflict of interest in not going on it in any way. Is there no procedure for disqualification of the U.S. attorney in matters where he preceives a conflict of interests?

Mr. HARRIS. There is none, and——

Mr. SNYDER. What would you do if you had facts submitted to you that you wanted to go to the grand jury that would involve prosecution of a close member of your family?

Mr. HARRIS. Certainly there are cases where one could recuse oneself but as a practical matter it would flow down to my next assistant. If I, for some personal reason, could not participate in a particular matter, then an assistant would become acting U.S. attorney for that particular purpose so that this problem would not disappear; it would simply shift from one person to another.

Mr. SNYDER. That procedure is not available in circumstances such as we are looking at today?

Mr. HARRIS. That is correct, sir. For every answer in this particular case there is an equal and opposite question.

Mr. SNYDER. Thank you.

The CHAIRMAN. The gentleman from Georgia.

Mr. LEVITAS. Just for the record, to make it complete for the record——

The CHAIRMAN. The gentleman has a minute-and-a-half.

Mr. LEVITAS. Title 28 United States Code, section 457 referring to the responsibilities of the U.S. attorney to sign pleadings of that sort indeed does use the word shall. I just make that as a matter of record.

Mr. HARRIS. But I didn't sign it.

The CHAIRMAN. Let me say, Mr. Harris, as we conclude these several hours and most of the attorneys talking about the legalese have been the prime motive here, but for someone who is not an attorney, what I have been disturbed about before this hearing, I am even more disturbed about before this hearing, I am even more disturbed about now because we have always considered, the average American, has always considered the Department of Justice as one of the great protectors of our democracy and its people and there are certain basic rights that the people have and that the Congress has through the people and that is the oversight of the executive's handling of the laws of the land.

In order to meet that responsibility in behalf of the people, the Congress is supposed to have available to it the information it needs so that it can do this oversight. Now there is no question about security-sensitive materials, the court can deny the Congress that. But what I look for here is some kind of a certainty that there is a mechanism by which the Congress will be able to meet that basic responsibility and I find that that is not available in any certainty because of the way the situation legally arises that the executive and the Department of Justice through the power which we talked about that a U.S. attorney has, can at any and every time deny the Congress, and therefore the people it represents, that right which they ought to have.

I think that it is a very, very serious thing for all the people in the country for the future, for many of the things and abuses to which an executive may try to use. I always thought that through this basic final step which caused former Secretary Kissinger, Secretary Duncan in the Carter administration and others to comply with the Congress' just demands that this was the way it could be done and now we find today that no matter what anybody thinks or anybody says it can be stopped by a representative of the Department of Justice of the United States.

I think that there is more that has to be done so we can assure that the basic rights of the people and their representatives in Congress, so that those people may fulfill the responsibility that they have.

I want to thank you very much for being here.

I have no date set for following up on this at all but I just feel a little bit worse about the rights of the people than I did before this hearing began this morning.

Mr. MOLINARI. I just have to ask the question, Mr. Chairman, if we would be able to move this, the resolution before the full committee.

The CHAIRMAN. I will discuss that. I had been prepared to say before that the resolution that you are talking about could be able to move next week. As of now I would like to talk to the gentlemen about it. I thought we would be able to clear up basic things that are far from being cleared up as a result of this hearing.

Mr. HARRIS. If I might make one final observation, Mr. Chairman, the documents that you talk about of course all have been produced as a result of the agreement which was worked out. What my problem is is simply the passage of time before the criminal matter can be finally disposed of.

The CHAIRMAN. If the documents had not been presented we still are—we still have no certainty that action would be taken to attempt to get them. That is what bothers me.

I thank you very much.

The committee stands adjourned.

[Whereupon, at 3:19 p.m., the committee was adjourned, subject to the call of the Chair.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	)	Civil Action No. 82-3583

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, by their undersigned counsel, hereby move this Court pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for an order granting summary judgment in their favor in that there exists no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law. This motion is based upon the attached declarations, exhibits and supporting memorandum of points and authorities, to which the Court is respectfully referred.

Respectfully submitted,

Paul McGrath
J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard
RICHARD K. WILLARD
Deputy Assistant Attorney General

Lewis K Wise
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Attorneys for Plaintiffs United States of America and Anne M. Gorsuch

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
et al.,)
)
Plaintiffs,) Civil Action No.
) 82-3583
v.)
)
THE HOUSE OF REPRESENTATIVES OF)
THE UNITED STATES, et al.,)
)
Defendants.)

ORDER

Upon consideration of Plaintiffs' Motion for Summary Judgment, supporting memorandum of points and authorities, the declarations of Carol Dinkins, Robert Perry and Stanley S. Harris and the exhibits filed in conjunction therewith, and the Court finding that there exists no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law, it is this ____day of ______________, 19___, hereby

ORDERED that Defendants' Motion to Dismiss is denied and it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is granted and it is further

ORDERED that judgment be entered in favor of plaintiffs.

____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No.
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,	)	82-3583
Defendants.	)	

PLAINTIFFS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 1-9(h), plaintiffs submit that there is no genuine issue as to the following material facts:

1. On November 22, 1982, a subcommittee of the House of Representatives, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation ("the Subcommittee"), served a subpoena upon Anne M. Gorsuch, Administrator of the Environmental Protection Agency ("EPA"). Declaration of Robert M. Perry ("Perry Dec."), para. 20 and Exhibit D.

2. That subpoena, as interpreted by the Subcommittee, called for Mrs. Gorsuch to produce to the Subcommittee all documents (except shipping papers and other commercial, business, contractor or technical documents) from EPA's files on hazardous waste sites designated by EPA for priority enforcement of the Comprehensive Environmental Response, Compensation and Liability Act of 1980,

42 U.S.C. §9601 et seq., commonly known as the Superfund Act. Perry Dec., para. 20 and Exhibit D; H.R. Rep. No. 968, 97th Cong. 2d Sess. (1982) ("Committee Report").

3. On November 30, 1982, the President told Mrs. Gorsuch to cooperate with the Subcommittee to the fullest extent possible but, invoking Executive Privilege, also instructed her not to produce from open Superfund Act law enforcement files any sensitive law enforcement documents, i.e., documents generated by attorneys and other enforcement personnel reflecting enforcement strategy, legal anaysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals. Perry Dec., paras. 22 and 23 and Exhibit E at 1-2 and 4.

4. Upon receiving that instruction, EPA intensively reviewed sensitive law enforcement documents from its open Superfund Act law enforcement files to insure that no documents would be withheld from the Subcommittee except as instructed by the President. Documents determined by EPA to be subject to the President's instruction were also reviewed by the Department of Justice under the supervision of the Assistant Attorney General in charge of the Land and Natural Resources Division. As of December 15, 1982, EPA and the Department of Justice had identified sixty-four documents as being subject to the President's instruction. The disclosure of any of those documents would impair the government's ability to conduct Superfund Act enforcement proceedings effectively. Those

documents were therefore withheld from the Subcommittee. The Subcommittee was provided with lists which identified each of those sixty-four documents and briefly explained why each document was being withheld. Perry Dec., paras. 16-18, 24 and Exhibit G; Declaration of Carol E. Dinkins ("Dinkins Dec."), paras. 6-9.

5. On December 2, 1982, the return date of the subpoena, Mrs. Gorsuch appeared before the Subcommittee and advised it that, pursuant to the President's instruction, she would not produce sensitive law enforcement documents from open Superfund Act law enforcement files. She also stated that EPA had begun to gather for production to the Subcommittee all EPA files on the 160 hazardous waste sites designated by EPA for interim priority Superfund Act enforcement. Those files included more than 750,000 pages of documents. Perry Dec., paras. 25-26 and Exhibit C at 3-5.

6. Mrs. Gorsuch brought with her to the Subcommittee hearing, and tendered to the Subcommittee, the first five file boxes of such documents, but the Subcommittee declined to accept delivery of those documents. Perry Dec. para. 26 and Exhibit C at 6.

7. Neither at the hearing nor at any subsequent time has the Subcommittee asked to examine any of the documents Mrs. Gorsuch brought to the hearing or offered to produce thereafter. Perry Dec., para. 25.

8. At the conclusion of the hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch to be in contempt for failure to comply with the subpoena and ordering that the matter be reported to the full Committee. On December 10, the Committee passed a resolution reporting the matter to the full House of Representa-

tives together with a recommendation that Mrs. Gorsuch be cited for contempt of Congress. On December 16, the House of Representatives cited Mrs. Gorsuch for contempt of Congress. The Subcommittee, Committee and House resolutions were all based on her refusal, pursuant to the instruction of the President, to produce sensitive law enforcement documents from open Superfund Act law enforcement files. On December 17, the Speaker and Clerk of the House of Representatives certified the contempt citation to the United States Attorney for the District of Columbia for criminal prosecution pursuant to 2 U.S.C. §§192 and 194. On the same date, the Sergeant-at-Arms of the House of Representatives delivered the certification to the United States Attorney. Perry Dec., paras. 27, and 29-31 and Exhibit I; Declaration of Stanley S. Harris ("Harris Dec."), para. 2 and Exhibit A; Committee Report at 55 and 70.

9. On December 27, 1982, the United States Attorney advised the Speaker of his conclusion that "it would not be appropriate for me to consider bringing this matter before the grand jury until the civil action [the action of bar] has been resolved." The Chairman of the Subcommittee subsequently called for the impeachment of the Attorney General and the United States Attorney. On January 3, 1983, the Speaker wrote to the United States Attorney, asserting that the pendency of this civil action did not alter the United States Attorney's duty to prosecute Mrs. Gorsuch. 129 Cong. Rec. H30-31 (daily ed. January 3, 1983) (Plaintiffs' Points and Authorities, Attachment A); Harris Dec., para. 3 and Exhibits B and C.

10. The defendants' demand for sensitive law enforcement documents from EPA's open Superfund Act law enforcement files

and their effort to prosecute Mrs. Gorsuch for her refusal to produce such documents have impaired EPA's ability to enforce the Superfund Act by: (1) impairing EPA's ability to assure enforcement personnel that sensitive law enforcement information, if reduced to writing, will not be prematurely disclosed; and (2) impairing EPA's ability to assure potential informants that, if they cooperate with the Agency, their identities and the information they provide will be effectively protected from premature disclosure. Perry Dec., paras. 32 and 33.

11. The Subcommittee has not demonstrated that the production of sensitive law enforcement documents from open Superfund Act law enforcement files is needed by the Subcommittee in order for it to perform its investigative or oversight functions. Perry Dec., para 25 and Exhibit C at 4.

Respectfully submitted,

J. Paul McGrath
J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard
RICHARD K. WILLARD
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,

Defendants.

Civil Action No. 82-3583

PLAINTIFFS' MOTION FOR LEAVE TO FILE POINTS AND AUTHORITIES IN EXCESS OF THE PAGE LIMITATION OF LOCAL RULE 1-9(e)

The plaintiffs, by their undersigned counsel, respectfully move this Court for permission to file a Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, and in Opposition to Defendants' Motion to Dismiss, the text of which exceeds the 45 page limitation of Local Rule 1-9(e). In support of this motion, plaintiffs submit that this action raises critically important constitutional issues that have given rise to this unique suit. By this suit we seek from the Judicial Branch a resolution of the constitutional impasse that now exists between the other two coordinate branches of the federal government. Consequently, the memorandum requires a thorough discussion of the legal issues raised by the suit.

For the foregoing reasons, plaintiffs seek permission to file this Memorandum notwithstanding the page limitation. The Memorandum is being filed conditionally with this Motion.

Respectfully submitted,

J. Paul McGrath
J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard
RICHARD K. WILLARD
Deputy Assistant Attorney General

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Attorneys for Plaintiffs United States of America and Anne M. Gorsuch

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	Civil Action No. 82-3583
v.	)	
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' Motion for Leave to File a Points and Authorities in Excess of the Page Limitation of Local Rule 1-9(e), it is this ____ day of _________, 19__, hereby

ORDERED, that Plaintiffs' Motion is granted and it is further

ORDERED, that the Clerk shall file Plaintiffs' Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss previously filed conditionally.

____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs,	)	Civil Action No. 82-3583
v.	)	
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	)	

PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT AND JOIN THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES AS A PARTY DEFENDANT

Pursuant to Federal Rules of Civil Procedure 15(a) and 19(a), plaintiffs, by their undersigned attorneys, hereby move this Court for leave to file their Second Amended Complaint. The Second Amended Complaint joins as a party defendant in his official capacity the Sergeant-At-Arms of the House of Representatives, Mr. Jack Russ. Plaintiffs had included the Sergeant At Arms as a party defendant in their original complaint, filed December 16, 1982, but mistakenly omitted the Sergeant-At-Arms as a party in the First Amended Complaint, filed December 29, 1982. Because the Sergeant-At-Arms participated in the delivery of the certification of the contempt resolution by the House of Representatives to the United States Attorney,[*/] he is a necessary and proper party to this action.

The Second Amended Complaint also alleges that defendant the Clerk of the House participated in certying the contempt resolution to the United States Attorney. Plaintiffs mistakenly

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[*/] See Declaration of Stanley S. Harris, ¶2, submitted in support of Plaintiffs' Motion for Summary Judgment.

omitted that allegation in the First Amended Complaint.

The Second Amended Complaint is being filed conditionally with this Motion.

Respectfully submitted,

J. Paul McGrath

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard

RICHARD K. WILLARD
Deputy Assistant Attorney General

Lewis K. Wise

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	)	Civil Action No. 82-3583

O R D E R

Upon consideration of Plaintiffs' Motion for Leave to Amend the Complaint and Join the Sergeant At Arms of the House of Representatives as a party defendant to this action, it is this ____ day of _____________, 19___, hereby

ORDERED that plaintiffs' motion is granted and it is further

ORDERED that the Clerk shall file Plaintiffs' Second Amended Complaint previously filed conditionally.

UNITED STATES DISTRICT JUDGE

SUMMONS IN A CIVIL ACTION

United States District Court

FOR THE

District of Columbia

CIVIL ACTION FILE NO._______

UNITED STATES OF AMERICA,

Plaintiff

v.

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, *et al.*,

Defendants

SUMMONS

To the above named Defendant : Hon. James J. Howard, Chairman, The Committee on Public Works and Transportation of the U.S. House of Representatives

You are hereby summoned and required to serve upon Betsy J. Grey

plaintiff's attorney , whose address is Civil Division, U.S. Department of Justice, Room 3531, 9th & Pennsylvania Avenue, N.W., Washington, D.C. 20530

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES F. DAVEY
Clerk of Court.

Herbert A. Walker
Deputy Clerk.

Date. DEC 16 1982

[Seal of Court]

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
c/o U.S. Department of Justice
9th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Plaintiff,

v.

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES; THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE ELLIOTT J. LEVITAS, CHAIRMAN OF THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE THOMAS P. O'NEILL, SPEAKER OF THE HOUSE OF REPRESENTATIVES; EDMUND L. HENSHAW, JR., THE CLERK OF THE HOUSE OF REPRESENTATIVES; BENJAMIN J. GUTHRIE, SERGEANT AT ARMS OF THE HOUSE OF REPRESENTATIVES; JAMES T. MOLLOY, THE DOORKEEPER OF THE HOUSE OF REPRESENTATIVES,

Defendants.

Civil Action No. 82- 3583

FILED
DEC 16 1982
JAMES F. DAVEY
CLERK

COMPLAINT
(For Injunctive and Declaratory Relief)

The United States of America, by its undersigned attorneys, brings this civil action for injunctive and declaratory relief and for its complaint against the defendants alleges as follows:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345.

2. The plaintiff is the United States of America.

3. The defendant, the United States House of Representatives, has the power to summon a witness to give testimony or produce papers concerning matters properly under inquiry before the House of Representatives.

4. The defendant, the Committee on Public Works and Transportation of the House of Representatives, has the power to summon a witness to give testimony or produce papers concerning matters

properly under inquiry before the Committee and to vote to cite a witness in contempt of Congress for failing to testify or produce subpoenaed documents.

5. The defendant, the Honorable James J. Howard, is the Chairman of the Committee on Public Works and Transportation of the House of Representatives.

6. The defendant, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation of the House of Representatives, has the power to summon a witness to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to cite a witness in contempt of Congress for failing to testify or produce subpoenaed documents.

7. The defendant, the Honorable Elliott J. Levitas, is the Chairman of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation of the House of Representatives.

8. The defendant, the Honorable Thomas P. O'Neill, in his official capacity as the Speaker of the House of Representatives, has the power to certify to the United States Attorney a statement of facts of a refusal by a witness to testify or produce subpoenaed documents to Congress and to request criminal prosecution of the witness under 2 U.S.C. § 194 for contempt of Congress.

9. Defendant, Edmund L. Henshaw, Jr., is the Clerk of the House of Representatives.

10. Defendant, Benjamin J. Guthrie, is the Sergeant at Arms of the House of Representatives.

11. Defendant, James T. Molloy, the Doorkeeper of the House of Representatives, has the duty to deliver the certification of the Speaker of the House of Representatives requesting criminal prosecution under 2 U.S.C. § 194 to the United States Attorney.

12. Venue properly resides in this judicial district pursuant to 28 U.S.C. § 1391(b).

13. This is a civil action seeking a declaratory judgment and injunctive relief on the ground that efforts to compel production of the documents discussed below are unconstitutional because the dissemination of such documents, which are part of

open investigatory law enforcement files and deliberative decisionmaking materials, outside of the Executive Branch would impair the President's constitutional obligation to ensure that the laws be faithfully executed. United States Constitution, Art. II, Sec. 1. See United States v. Nixon, 418 U.S. 683, 711 (1974).

COUNT I

14. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, authorizes the President to act to remove or arrange for the removal of hazardous substances, pollutants, or contaminants released into the environment that the President deems is necessary to protect the public health or welfare of the environment. 42 U.S.C. § 9604.

15. Funds for the administrative activities under CERCLA, are provided in part through a tax on chemical and crude oil producers.

16. Pursuant to Executive Order 12286, January 14, 1981, 46 Fed. Reg. 9901, the President's responsibility for carrying out the provisions of CERCLA have been delegated, in part, to the Administrator of EPA.

17. Under CERCLA, EPA identifies hazardous waste sites to determine, among other things, potentially responsible parties. EPA also has the authority to seek criminal and civil penalties against those parties at such sites.

18. EPA has generated an interim priority list that targets approximately 160 hazardous waste sites throughout the country for investigation.

19. If EPA deems that legal action is necessary, it refers the matter to the Department of Justice.

20. The Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce [Subcommittee on Energy and Commerce] and the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation [Subcommittee on Public Works and Transportation] have been examining the implementation of CERCLA since its enactment in 1980.

21. On or about November 22, 1982, the Committee on Public Works and Transportation served on Anne M. Gorsuch, Administrator of EPA, a subpoena calling for her to appear before the Subcommittee and produce by December 2, 1982 the following described documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980."

22. In response to this request, EPA has either offered to produce or make available for copying by the Subcommittee approximately 787,000 documents, which would cost approximately $223,000 and would require an expenditure of more than 15,000 personnel hours.

23. EPA did not produce approximately 74 documents to the Subcommittee.

24. After careful review, President Reagan found that documents such as those withheld are from open law enforcement files that are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals. He found that such documents should not be made available to Congress or to the public except in extraordinary circumstances. He then concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and instructed Anne M. Gorsuch, Administrator of EPA to withhold the documents from the Subcommittee. (See Attachment 1).

25. The documents withheld from the Subcommittee comprise less than 1% of the enforcement documents requested.

26. On December 2, 1982, the Subcommittee on Public Works and Transportation voted to cite Administrator Gorsuch in contempt of Congress for withholding the documents.

27. On December 10, 1982, the Committee on Public Works and Transportation passed a resolution to report a contempt action to the full House of Representatives.

28. On December 16, 1982, the House of Representatives passed a resolution citing Administrator Gorsuch for contempt of Congress.

29. Section 194 of Title 2 provides:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

30. Under that provision, certification by the Speaker of the House of the contempt resolution and a request for criminal prosecution by the United States Attorney is imminent.

31. On or about October 21, 1982, the Subcommittee on Energy and Commerce served on Anne M. Gorsuch, Administrator of EPA, a subpoena calling for her to appear before the Subcommittee and produce the following described documents:

> Copies of all books, records, correspondence, legal and other memoranda, papers and documents relative to the Tar Creek, Oklahoma; Stringfellow Acid Pits, California; and Berlin and Farro, Michigan, hazardous waste sites, excepting shipping records, contractor reports and other technical documents.

32. These same documents have been subpoenaed by the Subcommittee on Public Works and Transportation.

33. In response to this request, EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents.

34. After careful review, President Reagan found that documents such as those withheld are from open law enforcement files that are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals. He found that such documents should not be made available to Congress or to the public except in extraordinary circumstances. He then concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and instructed Anne M. Gorsuch, Administrator of EPA to withhold the documents from the Subcommittee. [See Attachment 1].

35. On December 14, 1982, the Subcommittee on Energy and Commerce voted to cite Administrator Gorsuch in contempt of Congress for withholding the documents.

36. Plaintiff has made several offers of accommodations concerning access by the Subcommittee to the documents that would enable the Subcommittees to fulfill their legitimate legislative functions while allowing plaintiff to preserve its constitutional privilege.

37. The Executive has the privilege to ensure the confidentiality of its law enforcement files and its deliberative process. United States v. Nixon, 418 U.S. 683 (1974).

38. Production of these documents to the House of Representatives would unconstitutionally contravene the executive privilege.

39. The subpoena issued by the Subcommittee on Public Works and Transportation is constitutionally defective because it is overbroad. Moreover, the Subcommittee has not demonstrated a specific need for the documents in question.

40. Administrator Gorsuch has been instructed by the President to withhold such privileged documents from the public and the Congress and therefore she has the right not to be subject to criminal prosecution for contempt under 2 U.S.C. § 194.

41. Therefore, there is no legal basis for the House of Representatives to serve upon the United States Attorney a request for criminal prosecution under the provisions of 2 U.S.C.

§ 194 or from taking any further action to enforce the outstanding subpoena with respect to such documents.

42. The United States has no adequate remedy of law.

43. Accordingly, the United States is entitled to an injunction to prevent such action.

COUNT II

1. The allegations made in paragraphs 1-42 inclusive, are reasserted and incorporated herein as if fully set forth.

2. Accordingly, the United States is entitled to declaratory relief that dissemination of the documents in question by the Executive Branch would unconstitutionally impair the President's constitutional obligation to ensure the confidentiality of its law enforcement files and its decisionmaking process and that the withholding of the documents was proper.

WHEREFORE, the plaintiff, the United States of America, prays that this Court:

A. Enjoin and restrain defendants from taking any further action to enforce the outstanding subpoena served by the Committee on Public Works and Transportation with respect to such documents to coerce Anne M. Gorsuch, Administrator of EPA, to provide the privileged documents in question to the House of Representatives.

B. Declare that dissemination of the documents in question by the Executive Branch would unconstitutionally impair the President's constitutional obligation to ensure the confidentiality of its law enforcement files and its decisionmaking process.

C. Declare that Section 194 of Title 2 cannot be constitutionally invoked against an Executive official.

D. Declare that the subpoena issued by the Subcommittee on Public Works and Transportation is unconstitutional on its face and as applied.

E. Grant plaintiff such other, further and different relief as the Court may deem just and equitable.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Paul McGrath

J. PAUL McGRATH
Assistant Attorney General

Betsy J. Grey

BETSY J. GREY

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Attorneys for Plaintiff United
States of America

THE WHITE HOUSE
WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive
Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
c/o U.S. Department of Justice
9th St. & Pennsylvania Ave., N.W.
Washington, D.C. 20530

and

ANNE M. GORSUCH, ADMINISTRATOR,
Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

Plaintiffs,

v.

Civil Action No.
82-3583

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES; THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE ELLIOTT J. LEVITAS, CHAIRMAN OF THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE THOMAS P. O'NEILL, SPEAKER OF THE HOUSE OF REPRESENTATIVES; EDMUND L. HENSHAW, JR., CLERK OF THE HOUSE OF REPRESENTATIVES; JACK RUSS, SERGEANT AT ARMS OF THE HOUSE OF REPRESENTATIVES; AND JAMES T. MOLLOY, DOORKEEPER OF THE HOUSE OF REPRESENTATIVES,

Defendants.

SECOND AMENDED COMPLAINT
(For Declaratory Relief)

The United States of America and Anne M. Gorsuch, by their undersigned attorneys, bring this civil action to obtain declaratory relief and for their complaint against the defendants allege as follows:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331, 1345.

2. The plaintiffs are the United States of America and Anne M. Gorsuch, in her official capacity as Administrator of the Environmental Protection Agency ("EPA").

3. The defendant House of Representatives of the United States ("House of Representatives") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the House of Representatives.

4. The defendant Committee on Public Works and Transportation of the House of Representatives ("the Committee") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to recommend that a witness be held in contempt of Congress for failing to testify or produce subpoenaed documents.

5. The defendant the Honorable James L. Howard is the Chairman of the Committee. He is sued in his official capacity only.

6. The defendant Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation of

the House of Representatives ("the Subcommittee") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to recommend that a witness be held in contempt of Congress for failing to testify or produce subpoenaed documents.

7. The defendant the Honorable Elliott J. Levitas is the Chairman of the Subcommittee. He is sued in his official capacity only.

8. The defendant the Honorable Thomas P. O'Neill, as the Speaker of the House of Representatives, has the power to certify to the United States Attorney a statement of facts of an alleged failure by a witness to testify or produce subpoenaed documents to Congress and to request criminal prosecution of the witness under 2 U.S.C. § 194 for contempt of Congress. He is sued in his official capacity only.

9. The defendant Edmund L. Henshaw, Jr., is the Clerk of the House of Representatives. He is sued in his official capacity only.

10. The defendant Jack Russ is the Sergeant at Arms of the House of Representatives. He is sued in his official capacity only.

11. The defendant, James T. Molloy, the Doorkeeper of the House of Representatives, has the duty to deliver the certification of the Speaker of the House of Representatives requesting criminal prosecution under 2 U.S.C. §194 to the United States Attorney. He is sued in his official capacity only.

12. Venue properly resides in this judicial district pursuant to 28 U.S.C. § 1391(b).

13. This is a civil action seeking declaratory relief pursuant to 28 U.S.C. §2201 with respect to defendants' efforts, discussed below, to compel production of certain documents.

14. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 et seq., authorizes the President to take action at sites that contain hazardous waste. This Act authorizes action to remove or arrange for the removal of hazardous substances, pollutants, or contaminants released into the environment to protect the public health or welfare. 42 U.S.C. § 9604.

15. Funds for the administrative activities under CERCLA are provided in part through a tax on chemical and crude oil producers.

16. Pursuant to Executive Order 12316, August 14, 1981, 46 Fed. Reg. 42237, the President's responsibility for carrying out the provisions of CERCLA have been delegated, in part, to the Administrator of EPA.

17. Under CERCLA, EPA identifies hazardous waste sites to determine, among other things, potentially responsible parties. EPA also has the authority to seek criminal and civil penalties against those parties at such sites.

18. EPA has generated an interim priority list that targets approximately 160 hazardous waste sites throughout the country for investigation.

19. If EPA deems that legal action is necessary, it refers the matter to the Department of Justice.

20. On March 10, 1982, the Subcommittee opened hearings on certain environmental matters, which included the implementation of CERCLA.

21. On September 15, 1982, Chairman Levitas, on behalf of the Subcommittee, wrote a letter to Administrator Gorsuch (Attachment 1 hereto), which letter stated in pertinent part:

> . . . this letter, in conformance with the provisions of section 104(e)(2)(D) of [CERCLA], is to request that all information being reported to or otherwise being obtained by [EPA] or any others acquiring such information on behalf of [EPA], be made available to the subcommittee.

22. In order to respond to the Subcommittee's concerns, EPA has offered either to produce or make available for copying by the Subcommittee approximately 787,000 pages of documents, which would cost approximately $223,000 and would require an expenditure of more than 15,000 personnel hours. The Subcommittee has declined to review most of those documents.

23. EPA withheld from the Subcommittee certain documents generated by government attorneys and other enforcement personnel in the development of potential litigation against private parties. Those documents, which are part of open law enforcement files, are sensitive memoranda and notes reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials.

24. On November 16, 1982, the Subcommittee issued, and on November 22, 1982, the Subcommittee served on Administrator Gorsuch a subpoena ("the Subpoena") calling for her to appear before the Subcommittee on December 2, 1982 and to produce at that time the following described documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of [CERCLA].

(Attachment 2 hereto, emphasis supplied).

25. After careful review, EPA, the Attorney General, as well as the President found that documents such as those referred to in paragraph 22 of this Complaint, that is, memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials, might, if disclosed, adversely affect pending enforcement action, overall enforcement policy, or the rights of individuals.

26. On November 30, 1982, the President concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and, pursuant to the authority vested in him by the Constitution and laws of the United States, instructed Administrator Gorsuch that such documents should not be

made available to Congress or the public except in extraordinary circumstances.

27. Upon receiving this instruction EPA reviewed the documents previously withheld from the Subcommittee, which then totalled seventy-four. On December 14, 1982, ten of those documents were produced, based upon a determination that dissemination of them would not adversely affect pending enforcement actions, overall enforcement policy or the rights of individuals. [EPA continued to withhold the remaining sixty-four.

28. As of December 2, 1982, the return date of the Subpoena, EPA had not listed any sites as national priorities pursuant to Section 105(8)(B) of CERCLA. Accordingly, no documents of the type described in the Subpoena were in existence at any relevant time.

29. On December 2, 1982, Administrator Gorsuch appeared before the Subcommittee and advised it that no documents of the type described in the Subpoena were in existence. That appearance and advice constitute full compliance with the requirements of the Subpoena. Administrator Gorsuch also advised the Committee that the documents referred to in paragraph 26 of this Complaint were being withheld from the Subcommitee pursuant to the President's instruction. She tendered to the Subcommittee approximately five file boxes of documents which were responsive to the Subcommittee's apparent concerns, as best as EPA could perceive them, but the Subcommittee refused to accept delivery of those documents.

30. At the conclusion of the hearing on December 2, 1982, the Subcommittee passed a resolution finding Administrator Gorsuch in

contempt for failure to comply with the Subpoena and reporting the matter to the Committee. (Attachment 4 hereto).

31. On December 10, 1982, the Committee reported an alleged refusal of Administrator Gorsuch to comply with the Subpoena to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. (Attachment 5 hereto).

32. On December 16, 1982, the House of Representatives passed a resolution directing the Speaker to certify to the United States Attorney for the District of Columbia the report of the Committee on the alleged contumacious conduct of Administrator Gorsuch in failing and refusing to furnish documents in compliance with the Subpoena. H. Res. 632 (Attachment 6 hereto).

33. Section 194 of Title 2 provides:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

34. On December 17, 1982, Speaker O'Neill and Clerk of the House Henshaw certified to the United States Attorney for the District of Columbia an alleged failure and refusal of Administrator Gorsuch to produce subpoenaed documents to the Subcommittee. (Attachment 7 hereto).

35. The Sergeant at Arms delivered said certification to the United States Attorney for the District of Columbia on December 17, 1982.

36. The Subpoena exceeds the jurisdiction of the Subcommittee.

37. If the Subpoena were deemed to include a request for the production of any documents other than those concerning sites listed as national priorities pursuant to Section 105(8)(B) of CERCLA, the Subpoena is unlawful because it fails to describe the requested documents with adequate specificity.

38. The Executive Branch has both the constitutional and a common law privilege to ensure the confidentiality of its law enforcement files and its deliberative processes. Producing to the Subcommittee the documents referred to in paragraph 27 would contravene those privileges. Accordingly, even if the Subpoena were deemed to require Administrator Gorsuch to produce those documents, her refusal to do so was lawful in all respects.

39. The plaintiffs have offered to attempt to compromise this dispute, but the defendants continue to demand that all of the documents referred to in paragraph 27 of this Complaint be produced.

40. The defendants have not and cannot show any compelling need for those documents sufficient to overcome the plaintiffs' need to prevent their disclosure.

41. The acts of defendants complained of herein have injured plaintiffs by impairing their ability to meet their obligation to execute the laws of the United States faithfully, by impeding them in the lawful exercise of the powers conferred upon the Executive Branch by the Constitution and laws of the United States, by creating inconsistent obligations, and by damaging their reputation for obedience to the rule of law.

42. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court:

A. Enter a judgment declaring that Administrator Gorsuch has fully complied with all requirements of the Subpoena; or, in the alternative,

B. Enter a judgment declaring that, insofar as Administrator Gorsuch did not comply with the Subpoena, her non-compliance was lawful; and

C. Grant plaintiffs such other, further and different relief as the Court may deem just and equitable.

Respectfully submitted,

J Paul McGrath
J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard
RICHARD K. WILLARD
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Attorneys for Plaintiffs United
States of America and Anne M.
Gorsuch

JAMES J. HOWARD, N.J., CHAIRMAN

Committee on Public Works and Transportation
U.S. House of Representatives
Room 2165, Rayburn House Office Building
Washington, D.C. 20515

B-376 Rayburn Building
Washington, D.C. 20515
September 15, 1982

Honorable Anne M. Gorsuch
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mrs. Gorsuch:

In March of this year, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation initiated a series of hearings to examine the regulation of hazardous and toxic substance releases into the environment and their effects on ground and surface water quality. As part of this review, the Subcommittee is examining the efforts being made by federal, state and local governments, and others, to carry out the provisions of the "Superfund" law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510.

The effective conduct of this investigation will necessarily require the review of the progress being made to cleanup specific abandoned waste sites. Accordingly, this letter, in conformance with the provisions of Section 104(e)(2)(D) of P.L. 96-510, is to request that all information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency, be made available to the Subcommittee.

In that the Subcommittee's inquiry is of an ongoing nature, and can be expected to involve all activities underway in your Agency's ten regions, I recommend that you have the appropriate person on your staff contact Bob Prolman (225-3274) of the Subcommittee staff to work out the arrangements necessary to facilitate this request.

Exhibit 1

I look forward to your full cooperation and assistance in this matter.

With best wishes, I am,

Very truly yours,

Elliott H. Levitas
Chairman
Subcommittee on
Investigations and Oversight

EHL/tjm
cc: Mr. Robert Perry

ORIGINAL

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Robert S. Prolman and/or Sante J. Esposito

You are hereby commanded to summon ANNE M. GORSUCH, Administrator, United States Environmental Protection Agency, 401 M Street, S. W., Washington, D. C. 20460 to be and appear before the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives of the United States, of which the Hon. Elliott H. Levitas is chairman, and to produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," in their chamber in the city of Washington, on December 2, 1982 at the hour of 10:00 a.m. then and there to testify touching matters of inquiry committed to said Committee; and ~~he is~~ she is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives
of the United States, at the city of Washington, this
16th day of November 19 82

James J. Howard
Chairman.

Attest:
Edmund L. Henshaw Jr.
EDMUND L. HENSHAW, JR., Clerk.

Exhibit 2

ORIGINAL

Subpena for ANNE M. GORSUCH

Administrator,

U.S. Environmental

Protection Agency

before the Committee on the

Served 1-22-82

R S

House of Representatives

[illegible]

THE WHITE HOUSE
WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

Exhibit 3

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

Office of the Attorney General
Washington, D.C. 20530

30 NOV 1982

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
  and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless,

it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
>
> "Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

> "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> "I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

> "[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all Members of the House shall have access thereto . . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. 1/ To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (*see Senate Select Committee* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." *United States* v. *Nixon*, 418 U.S. at 705, *quoting Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

1/ Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in *United States* v. *Nixon*, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under *United States* v. *Nixon* would be identical even if the Court had itself not used the word "public" in the relevant passage.

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. 2/

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

In closing, I emphasize that we have carefully reexamined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

William French Smith

William French Smith
Attorney General

CONTEMPT RESOLUTION REPORTED BY SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

Be it resolved that the subcommittee finds Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, in contempt for failure to comply with the subpoena ordered by this subcommittee and dated November 16, 1982, and the facts of this failure be reported by the Chairman of the Subcommittee on Investigations and Oversight to the Committee on Public Works and Transportation for such action as that Committee deems appropriate.

Exhibit 4

CONTEMPT RESOLUTION REPORTED BY COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Resolved, That the Committee on Public Works and Transportation report and refer refusal of Anne M. Gorsuch, Administrator, Environmental Protection Agency, to comply with the subpoena dated November 16, 1982, issued by the Subcommittee on Investigations and Oversight, together with all facts in connection therewith, to the House of Representatives with the recommendation that Administrator Gorsuch be cited for contempt of the House of Representatives to the end that she may be proceeded against in a manner and form provided by law.

Exhibit 5

The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. [illegible]

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw Jr.
Clerk of the House of Representatives

Exhibit 7

H. Res. 632

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

Exhibit 6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	Civil Action No. 82-3583
v.	)	
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,	)	
Defendants.	)	

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	Civil Action No. 82-3583

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This suit for declaratory relief raises one legal issue: May Congress compel an Executive Branch official to produce sensitive materials from open law enforcement files even though the disclosure of those documents would, in the opinion of the President and the Attorney General, impair the President's ability to take care that the laws will be faithfully executed. Although the Executive Branch has historically withheld information of this sort from Congress under a claim of privilege, this is the first time in history that the Legislative Branch has cited an official of the Executive Branch for contempt of Congress for doing so.

By this suit, we seek from the Judicial Branch a resolution of the unprecedented constitutional impasse which now exists between the other two coordinate branches of the federal government. Only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of governmental operations. Historically, judicial resolution of controversies between Congress and the Executive has been rare, because confrontations such as the present one have been rare. Yet judicial intervention is now urgently needed, because it is the only way left to resolve in an acceptable fashion the critically important issues that give rise to this unique suit.

We ask this Court to declare that the Executive acted lawfully in withholding under a claim of privilege, certain documents sought by Congress.

STATEMENT OF THE CASE

On December 16, 1982 -- for the first time in history -- a House of Congress held the head of an Executive agency or department in contempt. That evening, the House of Representatives voted a contempt citation against Anne M. Gorsuch, Administrator of EPA, for her refusal to furnish a limited number of sensitive law enforcement documents demanded by a subcommittee subpoena. Mrs. Gorsuch's refusal to produce these documents was based on a determination -- shared by the President and the Attorney General -- that their production would impair performance of the President's constitutional duty to "take care that the laws be faithfully executed." The House's contempt vote occurred even though its subcommittee had no basis for concluding it had a particular need for the documents in question, since it had not yet reviewed the vast number of other documents EPA was producing for it. By certifying the contempt citation to the United States

Attorney for this District pursuant to 2 U.S.C. §§192, 194[*] the House of Representatives has demanded that the Executive Branch subject Mrs. Gorsuch to criminal prosecution for withholding the documents. The Chairman of the Subcommittee has gone so far as to threaten the United States Attorney and even the Attorney General with impeachment unless such a criminal action is commenced. 128 Cong. Rec. H10046 (daily ed. Dec. 16, 1982); 129 Cong. Rec. H30 (daily ed. Jan. 3, 1983).

The events leading to this extraordinary situation are not in dispute. They stem from an investigation by the Subcommittee on Oversight and Investigations of the Committee on Public Works and Transportation [the "Levitas Subcommittee"] of EPA's efforts to enforce federal laws governing hazardous waste contamination of water resources. H.R. Rep. No. 968, 97th Cong., 2d Sess. 7 (1982). The investigation included the manner in which EPA was implementing the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., commonly known as "the Superfund Act."

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[*] Section 194 of Title 2 provides in relevant part:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required,. . . [by] any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session,. . . it shall be the duty of the . . . Speaker of the House, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the . . . House . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

A. Executive Responsibilities For Enforcing The Superfund Act.

The Superfund Act was designed to provide the federal government with the tools to abate the risks posed by hundreds of inactive and abandoned hazardous waste sites across the country. The Act provides two basic mechanisms by which the federal government may effect the cleanup of such sites. One mechanism allows the government to expend money from the $1.6 billion "Superfund," which is derived from congressional appropriations and taxes on crude oil, petroleum products and certain chemical products. See 42 U.S.C. §9631. Once spent, the money may be recovered from parties made liable for the cleanup costs pursuant to Section 107 of the Act. See 42 U.S.C. §9607. The second mechanism authorizes the President to require the Attorney General to institute judicial proceedings to "secure such relief as may be necessary to abate" an imminent and substantial danger to the public health or welfare or the environment. See 42 U.S.C. §9606. See generally United States v. Charles Price, 688 F.2d 204 (3rd Cir. 1982); United States v. Reilly Tar & Chemical Corporation, 546 F. Supp. 1100 (D. Minn. 1982). Declaration of Robert M. Perry ("Perry Dec."), submitted herewith, para. 4.

On August 14, 1981, President Reagan issued Executive Order 12316, "Responses to Environmental Damage." By that order, the President delegated part of his authority to carry out the provisions of the Superfund Act to the Administrator of EPA. Pursuant to that delegation, EPA now has the authority to identify hazardous waste sites and to determine, among other things, the parties potentially responsible for the generation of the hazardous wastes located there. The Administrator of EPA may request the Attorney General to institute judicial actions, but only the President may require him to do so. See 42 U.S.C. §9606. Perry Dec., para. 5.

At bottom, both mechanisms are part of an overall law enforcement effort designed to protect the public health and welfare and the environment from the effects of the release or threatened release of hazardous substances which may present an imminent and substantial danger. 42 U.S.C. §9604(a). In addition to the institution of judicial proceedings, the Act provides broad enforcement powers, authorizing the President or his delegate to issue administrative orders necessary to protect the public health and welfare or the environment and to require designated persons to furnish information about the storage, treatment, handling or disposal of hazardous substances. See 42 U.S.C. §§9606, 9604(e)(1). The Act also contains criminal penalties. 42 U.S.C. §9603. Perry Dec., para. 6.

As with any new program, the implementation and enforcement of the Superfund Act has required the government to put into place the policies and personnel needed to carry out the statutory mandates. In the two years since the Superfund Act became law, EPA has pursued the implementation of this new statutory mandate with vigor. It has developed and published the National Contingency Plan required by Section 105 of the Act, 42 U.S.C. § 9605, which serves as the basis for Superfund-financed cleanups.

See 47 Fed. Reg. 31180 (July 16, 1982). It has developed an Interim Priorities List identifying the 160 sites which pose the greatest risk to the public health and welfare and the environment. With assistance and input from the states, EPA has recently published a proposed National Priorities List identifying the 418 sites which, in EPA's judgment, require priority in use of the Superfund to effect cleanup. See 47 Fed. Reg. 58476 (December 30, 1982).*/ It has developed and published enforcement guidelines, as required by Section 106 of the Act, in consultation with the Attorney General. See 47 Fed. Reg. 20664 (May 13, 1982). Perry Dec., para. 7.

EPA has also pursued the enforcement of the Superfund Act. Since the passage of the Act, EPA has sent more than 1,760 notice letters, undertaken Superfund-financed action at 112 sites involving the obligation of more than $236 million, instituted Superfund claims in 25 judicial actions and obtained two criminal convictions. In its hazardous waste site efforts, the government has reached settlements in 23 civil actions providing for the expenditure of more than $121 million to conduct cleanup operations. In addition, the Agency and the Department are actively negotiating with responsible parties concerning the cleanup of 56 sites around the country. A recent judicial decision under the

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*/ The National Priorities List is required by Section 105(8)(B) of the Act, 42 U.S.C. §9605(8)(B). Completion of the list must be preceded by notice and opportunity for public comment, 42 U.S.C. §9605, para. 1, and may also be subject to legislative veto. 42 U.S.C. §9655. It is not yet known when the preparation of the National Priorities List will be completed.

Superfund Act termed the government's approach in these cases "reasonable from the standpoint of the long-range public interest." United States v. Seymour Recycling Corporation, Civil Action No. IP-80-457-C, ___ F. Supp. ____, (S.D. Ind. Dec. 15, 1982) Slip Op. (Attachment A hereto), 17. Perry Dec., para. 8.

EPA's goal in the implementation of the Superfund Act is, of course, to effect cleanups as expeditiously as possible for the protection of the public health and welfare and the environment. Since the Superfund cannot pay for the cleanup of all sites and since enforcement litigation is complex and time-consuming, EPA has adopted an approach which seeks in the first instance to obtain cleanup from parties it has identified as being responsible for or having contributed to the presence of hazardous substances at the sites. If voluntary cleanup cannot be achieved, the Agency then determines whether it will spend Superfund monies and sue for cost recovery under Section 107 or use its enforcement authority under Section 106 to obtain cleanup. Perry Dec., para. 9.

Before any meaningful contact with responsible parties can occur or administrative or judicial enforcement proceedings can be initiated, substantial time must be spent on investigation and case preparation. Of necessity, this is a time-consuming, resource-intensive process. It includes studying the nature and extent of the hazard present at sites, identifying potentially responsible parties and evaluating the evidence which exists or must be generated to support government action. This initial investigation is conducted by EPA attorneys and technical staff. Since many sites have literally hundreds of "generators" --

parties who produced or sent hazardous substances to the site -- the initial investigation of such a site typically will consume hundreds of hours and involve the examination of tens of thousands of documents. Perry Dec., para. 10.

Each continuing investigation is treated by EPA as an enforcement matter, since the government will, in almost every instance, proceed against responsible parties either for cost recovery or for injunctive relief. Moreover, even where voluntary settlements are obtained, EPA develops a strategy for conducting negotiations which is part of its overall enforcement effort. The staff which conduct the investigations are part of the Office of Enforcement Counsel and the Office of Solid Waste and Emergency Response, which are charged with the development and implementation of EPA's enforcement program in the hazardous waste area.* At an early stage in the case development process, prior to the time EPA formally refers a case for the institution of judicial enforcement proceedings, a Department of Justice attorney is assigned to assist in the case evaluation and development process. Perry Dec., para. 11; Declaration of Carol E. Dinkins ("Dinkins Dec."), attached hereto, para. 5.

Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at the site unless they undertake an adequate program to clean up the site. Typically, following the issuance of notice letters, EPA enters into negotiations with responsible parties to reach an agreement which would require those parties to clean up the site. Such negotiations may involve hundreds of potentially responsible parties and millions of dollars in cleanup costs. Moreover, EPA may settle the case with some but not all parties and then have to continue negotiations as to the remaining parties. Perry Dec., para. 12.

Because the enforcement process can be lengthy and extremely complex, an enormous amount of paperwork is generated. This includes data on the amounts, nature, and origin of waste present at a site; records of interactions with state and local government officials; records of the storage or disposal facility itself, as well as of the generators, treaters, transporters, and handlers of the substances which found their way to the sites. It also includes correspondence with responsible parties, contractors, state officials, and representatives of other federal agencies, legal opinions and interpretations, internal memoranda on such matters as negotiation strategy, rights and remedies of the parties, case strengths and weaknesses, and notes and logs from meetings and telephone conversations. Perry Dec., para. 13.

B. EPA's Efforts To Cooperate With The Levitas Subcommittee Investigation

On March 10, 1982, the Levitas Subcommittee opened a series of hearings on certain environmental matters, including implementation of the Superfund Act. H.R. Rep. No. 968, 97th Cong., 2d Sess. 7 (1982).[*/] Several EPA officials testified at numerous hearings before the Subcommittee and numerous EPA documents were made available to the Subcommittee. *Id*. at 9.

[*/] That report, hereafter "the Committee Report," is the Committee's official account of the alleged contempt of Congress by Mrs. Gorsuch.

The only documents not made available to the Subcommittee were documents from certain law enforcement files. Id. at 11.

Apparently unhappy with this limitation, Subcommittee Chairman Levitas sent a letter to Mrs. Gorsuch on September 15, 1982 requesting "all [Superfund] information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency." Perry Dec. 15 and Exhibit A.

In response to the Subcommittee's concerns, EPA made available to the Subcommittee almost all the documents from EPA's files on the 160 interim priority sites. EPA declined, however, to produce a small number of documents generated by government attorneys and other enforcement personnel in the development of potential litigation. Those documents, which were part of open law enforcement files, include sensitive memoranda and other sensitive papers which identify parties potentially liable under the Act and which discuss the strengths and weaknesses of the government's case against them, legal issues, anticipated defenses, timetables and other enforcement plans, negotiation and litigation strategy, the names of potential witnesses, their anticipated testimony and other evidentiary matters. Perry Dec., para. 16. In short, EPA withheld documents which in litigation would be characterized as sensitive attorney work-product material.*/

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*/ See Hickman v. Taylor, 329 U.S. 495 (1947). While we believe that the sensitive work-product nature of these documents is more than amply established by the declarations submitted herewith, we are willing to submit the documents to the Court for an *in camera* inspection should the Court determine that such an examination is necessary.

After this, there were a number of meetings, exchanges of letters and telephone conversations between the Subcommittee, on the one hand, and EPA and the Department of Justice on the other. EPA sought to accommodate the Subcommittee's concerns about the withheld documents in a manner which would meet the need to prevent their premature disclosure. The Subcommittee attempted to assure EPA that, if EPA produced those documents to the Subcommittee, an effort would be made to preserve their confidentiality. However, such documents, if produced, could be disclosed to other members of Congress and that Congress could decide to make the documents public even if EPA objected. Perry Dec., para. 19, Exhibit B, Exhibit C at 1-2 and Exhibit E at 7.

C. The November 22 Subpoena

On November 22, 1982, the Committee served on Mrs. Gorsuch a subpoena calling for her to appear before the Subcommittee on December 2, 1982 and to produce at that time the following described documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of [the Superfund Act.]

Perry Dec., para. 20 and Exhibit D. Even though EPA had not promulgated the above-mentioned statutory list of national priority sites, EPA nonetheless undertook, as a matter of accommodation to the Subcommittee, to begin to gather all documents pertinent to the Agency's Interim Priorities List of 160 sites. Some of those 160 cases were at that time in litigation while others were in earlier stages of development and negotiation. While gathering those documents, EPA segregated sensitive law enforcement documents for separate review. Perry Dec., para. 21.

Because the incipient controversy was assuming more critical significance, it was brought to the attention of the Attorney General and by him to the President at this time. Perry Dec., para. 22. After reviewing the matter, President Reagan wrote Mrs. Gorsuch instructing her to cooperate with the Subcommittee to the fullest extent possible. He also instructed her, however,

> that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittee in response to their Subpoena.

Perry Dec., para. 23 and Exhibit E.

On the day the President wrote his memorandum to Mrs. Gorsuch, the Attorney General sent a letter to Chairman Levitas indicating that

> "it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of

> Congress with access to or copies of law enforcement files except in the most extraordinary circumstances."

Perry Dec., para. 23 and Exhibit F. The Attorney General explained that

> "[o]ur policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to 'take care that the laws be faithfully executed.' . . . At bottom the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch."

Ibid.

Upon receiving this instruction, EPA intensively reviewed sensitive law enforcement documents from its open Superfund law enforcement files to insure that no documents would be withheld from the Subcommittee except as instructed by the President. Those documents which EPA determined were subject to the President's instruction were also reviewed by the Department of Justice under the supervision of the Assistant Attorney General of the Land and Natural Resources Division. Perry Dec., para. 24. As of December 15, 1982, EPA and the Department of Justice identified sixty-four documents, the disclosure of which would impair the government's ability to enforce the Superfund Act. These documents were therefore withheld from the Subcommittee. Perry Dec. paras. 16-18 and 24; Dinkins Dec., paras. 5-9. The Subcommittee was provided with lists which identified each of those sixty-four documents and briefly explained why each document was being withheld. Perry Dec., para. 26 and Exhibit G.

On December 2, 1982 Mrs. Gorsuch appeared before the Subcommittee as instructed by the subpoena. She advised the Subcommittee that the documents requested by the subpoena (documents concerning "those sites listed as national priorities pursuant to Section 105(8)(B)" of the Superfund Act) did not exist, because EPA had not yet listed any sites as national priorities pursuant to that section. Perry Dec., Exhibit C at 3. Nevertheless, she explained that EPA had "in a spirit of cooperation and comity" already begun to gather its files on the 160 interim priority sites and would make more than 750,000 pages of documents available to the Subcommittee. Ibid. She brought with her to the hearing, and tendered to the Subcommittee, the first five file boxes of such documents, but the Subcommittee declined to accept delivery of those documents. Id. at 6. Indeed, neither at that time nor at any subsequent time has the Subcommittee asked to examine any of the documents Mrs. Gorsuch brought to the hearing or offered to produce thereafter. Perry Dec., para. 25.

At the hearing, Mrs. Gorsuch also advised the Subcommittee that "sensitive documents found in open law enforcement files will not be made available to the Subcommittee," citing the President's instructions to her. Perry. Dec., para. 26 and Exhibit C at 5.

D. The Contempt Resolution and This Lawsuit

At the conclusion of its December 2 hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch to be in contempt for failure to comply with its subpoena. The Subcommittee reported the matter to the full Committee. Perry Dec., para. 27 and Committee Report at 57.

A final attempt was made to resolve the impasse between the Subcommittee and the Executive Branch at a meeting on December 8, 1982, but that attempt was unsuccessful. The Subcommittee's final proposal contemplated that its members and staff would have unrestricted access to sensitive documents from open law enforcement files. The Executive Branch, although willing to subject all such documents to an elaborate screening process within the Executive Branch to insure that no document would be improperly withheld, was unwilling to permit the requested Subcommittee examination because it contemplates

> that the President will lose control over the contents of material which those who assist him in enforcing the law have determined to be in a narrow category of documents the release of which would adversely affect the Executive Branch's ability to enforce the law.

Perry Dec. para. 28 and Exhibit H; Committee Report at 22-23.

On December 10, 1982, the Committee reported Mrs. Gorsuch's alleged failure to comply with the subpoena to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. On December 16, the House of Representatives passed a resolution citing Mrs. Gorsuch for contempt of Congress. On December 17, the Speaker and Clerk of the House certified the contempt citation to the United States Attorney for this District for criminal prosecution pursuant to 2 U.S.C. §§192 and 194. Late that evening, the certification was delivered to the United States Attorney by the House Sergeant at Arms. Perry Dec., paras. 29-31; Declaration of Stanley S. Harris ("Harris Dec."), para. 2 and Exhibit A; Committee Report, 57 and 70.

On December 27, 1982, the United States Attorney advised Speaker O'Neill of his conclusion that "it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved." Harris Dec., para. 3 and Exhibit B. Chairman Levitas subsequently called for the impeachment of the Attorney General and the United States Attorney. 129 Cong. Rec. H30-31 (daily ed., January 3, 1983) (Attachment B hereto). On January 5, 1982, Speaker O'Neill wrote a letter to the United States Attorney, asserting that the pendency of this civil action did not alter the United States Attorney's duty to prosecute Mrs. Gorsuch. Harris Dec. para. 3 and Exhibit C.

The Executive filed this action on December 16, 1982, minutes after the House vote of contempt, seeking both declaratory and injunctive relief. On December 29, the Executive filed an amended complaint, seeking declaratory relief only with respect to defendants' efforts to compel production of the withheld documents. On December 30, defendants filed a motion to dismiss the complaint.

SUMMARY OF ARGUMENT

This case is unique. There has rarely been a sharper confrontation between the Legislature and the Executive, and never one quite like this. Accordingly, while we are seeking what may appear to be extraordinary relief, that is because this is an extraordinary situation.

The House subpoena sought a broad array of documents concerning numerous open enforcement actions. EPA sought to accommodate the Subcommittee's needs by producing files on its 160 interim-priority cases. These files -- consisting of more than 750,000 pages of documents -- spell out in detail the technical background, parties, and procedural status of each matter. The only papers the Executive balked at turning over were a small minority of documents that are the most sensitive kind of prosecutorial work-product. Any leakage of such documents to the public or potential targets of EPA and the Justice Department could seriously undermine the integrity and effectiveness of law enforcement efforts.

The Subcommittee was urged to review the files being produced to see whether the additional few documents being withheld were essential for any legitimate oversight function. In addition, the Subcommittee was promised that the withheld documents would be made available once they were no longer enforcement sensitive. However, without establishing any need for immediate access to the withheld documents, the House -- in the midst of the Lame Duck session -- rushed to cite Mrs. Gorsuch for contempt of Congress and to demand that she be criminally prosecuted.

Only the Judiciary can resolve the resulting constitutional controversy, which reached a total impasse when the House of Representatives took the unprecedented step of citing an Executive official for contempt of Congress solely for following the instructions of the President that certain documents not be disclosed in order to preserve the ability of the Executive Branch faithfully to execute the law. By this motion for summary judgment,*/ the United States and Mrs. Gorsuch seek a declaration that the Executive Branch's refusal to release certain highly sensitive materials contained in open law enforcement files is fully in accordance with the law, so that the "unseemly" situation of a high-level Executive Branch official being cited for contempt of Congress and threatened with prosecution can be resolved.[*]

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*/ Summary judgment is appropriate pursuant to Rule 56, Fed.R.Civ.P. because there is no "genuine issue as to any material fact" and the plaintiffs are entitled to judgment as a "matter of law."

Such relief is available in this unique situation, as will be demonstrated below. First, the controversy is ripe for judicial review, because no further steps remain in the subpoena enforcement process and the other two branches of government are at complete loggerheads. The Executive has asserted a constitutional privilege to withhold the documents, and Congress is doing all it can to require the Executive to forego the privilege and to turn over the documents. Thus judicial review is necessary to determine the right of the Executive to assert the privilege and to vindicate that right if the Executive has properly asserted it. Second, this action may be pursued against the House and its members despite the Speech or Debate Clause of the Constitution, Art. I, §6, cl. 1, because the Court is not being asked to interfere with ongoing congressional action but merely to review the validity of efforts to enforce a complete legislative act. Finally, on the merits of the controversy, the refusal of the Executive Branch to produce the documents was properly based upon well-recognized separation of powers principles.

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[*] See United States v. Nixon, 418 U.S. 683, 691-92 (1974).

ARGUMENT

I. This Case Presents a Justiciable Claim For Declaratory Relief

A. This Court Has Subject Matter Jurisdiction

Subject matter jurisdiction for this suit is properly based on 28 U.S.C. §1331, because all of plaintiffs' claims arise from the Constitution and laws of the United States, and on 28 U.S.C. §1345, because this action was commenced by the United States. Defendants' arguments to the contrary are based on irrelevant cases and a confusion between subject matter jurisdiction and cause of action.*/

That this Court has subject matter jurisdiction over this case is confirmed by the Court of Appeals' decision in United States v. A.T.& T., 551 F.2d 384 (D.C. Cir. 1976). There the court held that an action brought by the United States to vindicate a claim of Executive privilege asserted against a congressional subpoena presented a claim arising under the Constitution of the United States and, hence, under §1331. Id. at 389.[*/] Using language applicable here the court stated at 389 that:

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*/ Defendants make the strange assertion that the Executive did not properly sue in the name of the United States. That assertion is wrong because the Attorney General here seeks to vindicate constitutional and legal rights of the President and two Executive Branch agencies. See 28 U.S.C. §§515-19; Senate Select Committee v. Nixon, 336 F. Supp. 51, 56-57 (D.D.C. 1973). The Executive historically has participated in litigation against the Legislative Branch in the name of the United States. See, e.g., Consumers Union v. FTC, No. 82-1737 (D.C. Cir., Oct. 22, 1982); Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977); United States v. A.T.& T., 551 F.2d 384 (D.C. Cir. 1976).

> Other decisions dealing with interbranch conflict have not discussed the problem of jurisdiction, but have nevertheless reached the merits. It seems to be assumed that these cases, dealing with the powers and relations of the branches of the United States, are maintainable in federal court, if justiciable at all. We need not resolve this question for we find subject matter jurisdiction under 28 U.S.C. §1331.

Defendants rely upon the first decision in Senate Select Committee v. Nixon, 366 F. Supp. 51 (D.D.C. 1973), in which a Senate Committee's attempt to enforce a congressional subpoena was dismissed for lack of subject matter jurisdiction. Defendants' Brief at 33-34. As defendants recognize, the court in that case rejected jurisdiction under §1331 for failure to satisfy the $10,000 amount-in-controversy requirement then applicable. 366 F. Supp. at 59-61.[**/] However, §1331 was subsequently

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[*/] Defendants attempt to distinguish A.T.& T. on two grounds. Defendants' Brief at 43. First, they suggest that A.T.& T.'s jurisdictional holding should be limited to cases in which Executive privilege is claimed on national security grounds. However, this is an argument on the merits, i.e., that there is no Executive privilege for law enforcement materials. Defendants' second argument is that A.T.& T should be distinguished because the congressional party in that case intervened as a defendant and was not originally sued. This purported distinction is irrelevant since the requirement of subject matter jurisdiction is as applicable to intervenors as to original parties. See 3B Moore's Federal Practice ¶24.18.

[**/] After enactment of a special jurisdictional statute, the court considered the Committeee's claim and rejected it on the merits. 370 F. Supp. 521 (D.D.C. 1974), aff'd, 498 F.2d 725 (D.C. Cir. 1974).

amended to eliminate the amount-in-controversy requirement for federal question jurisdiction. See 28 U.S.C. §1331, as amended Dec. 1, 1980, Pub. L. 96-486, §2(a), 94 Stat. 2369. This amendment to the jurisdictional statute thus eliminates any barrier to federal question jurisdiction over the present case.

Defendants also argue that there is no legislative history showing a specific congressional intent to confer jurisdiction on the federal courts to decide inter-branch suits. In particular, defendants advert to several proposals rejected by the Congress which would have conferred upon the courts a specific grant of jurisdiction for the civil enforcement of legislative subpoenas. Defendants' Brief at 34-35, 39-41. Yet the failure of Congress to enact such a statute is hardly surprising in view of the broad grant of jurisdiction created by §1331, as amended in Pub. L. 96-486, §2(a), 94 Stat. 2369, Dec. 1, 1980. Congress could not have been expected to enumerate every cause of action covered by such a general jurisdictional statute and did not attempt to do so. Indeed, this same argument was rejected by the Supreme Court in Powell v. McCormack, 395 U.S. 486 (1969). In that case, the defendants alleged that the Court lacked subject matter jurisdiction under 28 U.S.C. §1331 because the legislative history underlying that provision did not expressly state that it applied to suits questioning the exclusion of Congressmen from the House of Representatives. The Court first noted that "it has generally been recognized that the intent of the drafter was to provide a broad jurisdictional grant to the federal courts." Id. at 515. It then found that because the resolution of that case "depend[ed] directly on construction of the Constitution [and the] Court has consistently held such suits are authorized by [§1331]," id. at 516, the Court had subject matter jurisdiction over the lawsuit. Similarly, resolution of this dispute "depends directly on construction of the Constitution" and accordingly, subject matter jurisdiction lies under §1331.*/

In addition to federal question jurisdiction, §1345 also provides a basis for subject matter jurisdiction of the present case.[*] That section provides as follows:

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*/ Defendants also argue that no cause of action should be implied from §1331. Defendants' Brief at 36-41. This perplexing argument confuses the issue of subject matter jurisdiction with the existence of a cause of action. Plaintiffs have never asserted that their cause of action is implied under §1331. See Powell v. McCormack, 395 U.S. 486, 512-516 (1969).

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress. (Emphasis added.)

Defendants argue that this jurisdictional basis is unavailable because the final clause -- "expressly authorized to sue by act of Congress" -- is not satisfied. However, defendants misconstrue this section because that clause modifies the phrase "any agency or officer thereof" and not the phrase "the United States." *See generally* Reviser's Notes, 28 U.S.C. §1345; *Government National Mortgage Association* v. *Terry*, 608 F.2d 614 (5th Cir. 1979). *See also* *United States* v. *Mattson*, 600 F.2d 1295, 1299 (9th Cir. 1979); *United States* v. *Solomon*, 563 F.2d 1121, 1126 (4th Cir. 1977); Note, 85 Harv. L. Rev. 1566 (1972).

Defendants rely principally on *United States* v. *Mattson*, *supra*, and *United States* v. *Solomon*, *supra*, for the proposition that §1345 provides no additional capacity to the United States to sue "unless another statute expressly authorizes it." Defendants' Brief at 43. Yet both those cases recognized that where no statute expressly authorizes suit, "the government can sue if it has some interest that can be construed to warrant an implicit grant of authority." *United States* v. *Mattson*, 600 F.2d at 1298.

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[*] In *United States* v. *A.T.&T.*, the court found it unnecessary to decide whether §1345 furnished a basis for jurisdiction, since it found jurisdiction under §1331. 551 F.2d at 388-89.

See United States v. Solomon, 563 F.2d at 1126. The courts in both cases rejected a claim of a nonstatutory grant of authority to sue on behalf of mentally retarded patients in state hospitals because the government could not allege an injury in fact sufficient to grant standing to bring suit or to imply a nonstatutory cause of action on behalf of the United States. It is not argued here that §1345 grants the United States a cause of action. Rather, as demonstrated below, the United States and Mrs. Gorsuch can demonstrate sufficient harm to judicially cognizable interests to demonstrate standing to maintain this lawsuit.

B. Plaintiffs Have Standing

Plaintiffs have standing to sue because they have sustained injury-in-fact that is directly traceable to the conduct of defendants and which only the courts can adequately remedy. Although defendants prefer that this controversy be resolved by subjecting Mrs. Gorsuch to a criminal prosecution, requiring such a draconian solution "would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the government." United States v. Nixon, 418 U.S. 638, 691-92 (1974).

Mrs. Gorsuch has been cited for contempt by the House, which has submitted the matter to the Executive for prosecution. Indeed, even if she is never prosecuted by the Executive, the House's contempt citation, in and of itself, more than amply establishes the immediacy of this controversy. The House vote represents a formal determination by a co-equal branch of our government that the head of an Executive agency has failed to comply with the law. That citation thus stands as an accusation by the House of Representatives that an Executive officer has committed a criminal act in discharging her official duties as Adminstrator of the EPA.*/ The effectiveness of any high-level executive official is, at least in part, dependent upon the establishment of relations with the Legislative Branch free of the sort of coercion reflected by a contempt of Congress citation. These injuries are all concrete, direct and immediate and can only be redressed through judicial resolution.

In addition to the injury to Mrs. Gorsuch in her capacity as Administrator of EPA, the plaintiff United States has also suffered a legally cognizable injury. Here, the injury to the Executive Branch and its agencies is an unprecedented interference with its responsibility for faithful execution of the laws and derogation of its independence from a co-equal branch of government. The protection of these sensitive law enforcement files is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). As the Supreme Court found in an analogous context, the purpose of the privilege "is to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

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*/ Indeed, under well-established common law principles, the imputation of criminal behavior to an individual is generally considered defamatory per se and actionable without proof of special damages. 53 C.J.S. Libel and Slander §14. The Court of Appeals for this Circuit has held that damage to one's "good name and reputation" constitutes injury in fact for Article III purposes. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 524 (D.C. Cir. 1977). Here, Mrs. Gorsuch's reputation for fidelity to the rule of law has been seriously impugned by the contempt citation of the House.

NLRB v. Sears Roebuck & Co. involved Exemption 5 of the Freedom of Information Act, 5 U.S.C. §552, as applied to protect the deliberative process and work-product of the government from disclosure. The Court found that the exemption is necessary to preserve the efficacy of the decisionmaking process and to encourage the free exchange of ideas within the agency without the threat of public scrutiny. Id. at 150. See Coastal State Gas Corp. v. DOE, 617 F.2d 854, 866-69 (D.C. Cir. 1980); Bristol-Myers Co. v. FTC, 598 F.2d 18, 23-24 (D.C. Cir. 1978). In Coastal States Gas Corp. v. DOE, the Court recognized another reason for the exemption:

> to protect the adversary trial process itself. It is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case. Certainly less work-product would be committed to paper which might harm the quality of trial preparation. [617 F.2d at 864.]

Without judicial intervention here, the threat to the integrity of the enforcement efforts and decisionmaking process of EPA and the Department of Justice under the Superfund law becomes very real.

The threat of premature disclosure if the Executive loses control over sensitive law enforcement documents can well be expected to inhibit actions of all participants in the law enforcement process. It is likely, for example, that outside sources of information will not cooperate as freely due to the fear of possible premature disclosure; that parties responsible for the hazardous waste sites will avoid settlement negotiations and await possible disclosure of the government's settlement strategies, and that staff attorneys may shrink from conducting a candid and thorough evaluation of an enforcement action where those evaluations may be disclosed before the case has been completed. Accordingly, the threat that the Executive will lose control over enforcement file materials creates a present uncertainty as to the overall independence and integrity of the law enforcement process. See Perry Dec., paras. 32 and 33. Such uncertainty and the consequent harm to the enforcement process constitutes an injury-in-fact to the Executive's ability to execute the law and, hence, to the welfare of the general public.

[illegible] in the [illegible] document [illegible]

Defendants argue that the United States does not have standing, absent a statute, unless the case involves either a contractual or proprietary interest of the government, or harm to the national security or public welfare. Defendants' Brief at 46-49. Even if this were the correct standard, the harm to the public welfare threatened by enforcement of defendants' subpoena is sufficient to confer standing upon the United States as plaintiff, in accordance with such cases as In re Debs, 158 U.S. 564 (1895), and New York Times v. United States, 403 U.S. 713 (1971). There could be no greater harm to the public welfare than disruption of law enforcement activity by the Executive Branch.*/ The United States -- unlike other plaintiffs -- has authority to sue on behalf of the public welfare under Debs and its progeny. For this reason, the United States can bring suit to vindicate rights shared by the people in common or "generalized grievances," for which private individuals or organizations would not have standing. Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).**/

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*/ Of course, this argument in favor of standing presumes that plaintiffs have a good case on the merits. Such a situation is not uncommon, however, where the existence of a legally cognizable injury is effectively the same as the ultimate legal issue in the case. See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

**/ For this reason, United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977), cited by defendants, is inapposite. In Solomon, the court found that no nonstatutory grant of authority existed to sue on behalf of mentally retarded patients in state hospitals because, among other reasons, it could not be shown that "the immediate victims constitute 'the public at large.'" 563 F.2d at 1129.

The foregoing demonstration of injury-in-fact is easily traceable to the acts of defendants. It is the defendants who caused the subpoena to be served upon Mrs. Gorsuch, cited her for contempt of Congress, and certified the matter to the United States Attorney for criminal prosecution. Indeed, Defendants' brief to this Court repeatedly urges the criminal prosecution of Mrs. Gorsuch pursuant to 2 U.S.C. §194. Defendants' Brief at 9, 25, 26-27, 30-32, 46, 56. Chairman Levitas has threatened the United States Attorney and Attorney General with impeachment if they do not initiate criminal proceedings against Mrs. Gorsuch. _See_ p. 3, _supra_. Under these circumstances, it is disingenuous for defendants to argue that the

> "complaint doesn't offer a clue about how the present legislative defendants are responsible for [plaintiff's] injury, for it is not the legislative defendants who are responsible for proceeding under 2 U.S.C. §192."

Defendants' Brief at 50.

Defendants' final standing argument concerns the utility of declaratory relief to redress the injuries suffered by plaintiffs. This argument is best considered together with the appropriateness of declaratory relief under the circumstances, which follows.

C. Declaratory Relief Is Both Necessary and Proper

Under the Declaratory Judgment Act, a federal district court in any actual controversy within its jurisdiction may declare the rights and other legal relations of any interested parties seeking such a declaration whether or not any further relief is or could be sought. 28 U.S.C. §2201.*/ There are three criteria for the issuance of a declaratory judgment. First, there must be a "substantial controversy." Second, the controversy must be between parties having "adverse legal interests." Third, the controversy must be of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); see also Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972). In most cases, it would be premature to enter a declaratory judgment on the legality of a witness' refusal to comply with a subpoena except as a defense to a contempt proceeding. On the unique facts of this case, however, declaratory relief is appropriate.

First, there is a substantial controversy between the parties present here. The House subcommittee and committee in their written documents and in their vote to recommend a contempt citation have made clear their total disagreement with the tionale of the Executive Branch in refusing to turn over sensi- ve law enforcement materials. The full House of Representatives s ratified their position. The defendants take the position, d have so stated repeatedly, that a congressional committee is bsolutely entitled to all documents contained in the open law nforcement files of the EPA, an executive branch agency. On the ther hand, the Executive Branch has taken the position that the onstitution requires it to maintain control over documents where their release would impair the President's ability faithfully to execute the law. There is, then, without doubt a controversy both concrete and live between the parties.

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*/ The Declaratory Judgment Act does not grant any additional jurisdiction to the federal courts, but rather allows them to declare the rights and obligations of parties where an actual case cause or controversy already exists. Golden v. Zwickler, 394 U.S. 103 (1969).

Second, the parties have adverse legal interests. The House of Representatives has already voted that Mrs. Gorsuch be cited for contempt solely for following the instructions of the President. Moreover, this matter has now been referred to the United States Attorney for prosecution, and the Chairman of the House Subcommittee has threatened the United States Attorney and the Attorney General with impeachment proceedings unless Mrs. Gorsuch is prosecuted. In light of the extraordinary seriousness of this unprecedented situation, the parties have sharply adverse legal interests.

Third, this unique controversy has sufficient immediacy and reality to warrant a declaratory judgment here. The House has voted contempt and has referred that citation to the United States Attorney. The legislative process is complete, thus rendering this controversy both immediate and ripe.

The same legal concept is applicable here. As in the Nixon case, the "traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises." It is particularly "unseemly" that a high Executive offical has been cited for contempt of Congress for following the instruction of the President. The purely legal issues giving rise to this controversy should be resolved now in a civil lawsuit, as in Nixon, in order to resolve and thereby render "unnecessary" further protraction of this "constitutional confrontation."

The propriety of declaratory relief in this case is further supported by the rationale of Steffel v. Thompson, 415 U.S. 452 (1974). There the plaintiff had been warned twice to stop handbilling and demonstrating on the sidewalk of a shopping center. He then brought an action for injunctive and declaratory relief in the district court claiming that the application of the law to him would violate his First and Fourth Amendment rights. In ruling that there was a sufficient case or controversy for purposes of the Declaratory Judgment Act, the Court stated:

> In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968). [415 U.S. at 459].

Again, in Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972), the Court stated that when "compliance is coerced by the threat of enforcement, . . . the controversy is both immediate and real." 406 U.S. at 508.

Defendants appear to concede that declaratory relief would be available under the theory of Steffel v. Thompson if no prosecution was pending and there was a genuine threat of enforcement of a criminal statute. However, defendants argue that:

> the certification by the Speaker renders the prosecution 'pending' for purposes of Steffel, for 2 U.S.C. §194 imposes the non-discretionary duty upon the United States Attorney to at least present the matter to the grand jury.

Defendants' Brief, at 26-27.*/ This argument makes the dubious assumption that §194 must be interpreted in a literal manner to deprive the United States Attorney of any prosecutorial discretion in situations where a House of Congress has certified a finding of contempt. Such an interpretation would itself raise serious constitutional questions.

It is by now well-settled that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1973), citing Confiscation Cases, 7 Wall. 454 (1869); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, sub nom Cox v. Hauberg, 381 U.S. 935 (1965).**/ Indeed, the Court of Appeals for this Circuit has specifically recognized that the Executive Branch retains its traditional prosecutorial discretion under §194. As the court stated in Ansara v. Eastland, 442 F.2d 751, 754 & n.6 (D.C. Cir. 1971)

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*/ Defendants also rely upon dicta in United States v. A.T.&T., 551 F.2d at 393, n.16 (D.C. Cir. 1976) to the effect that "[c]riminal proceedings are begun" by a contempt resolution. Taken in context, this statement has nothing to do with the determination required by Steffel.

**/ This fundamental power derives from Article II, Section 3, of the United States Constitution which vests the Executive Branch with the authority to see that "the laws be faithfully executed." By virtue of this provision, the law enforcement prerogative resides "squarely in the executive arm of the government." Pugach v. Klein, 193 F. Supp. 630, 634 (S.D. N.Y. 1961). As the President's surrogate in discharging this executive function, Ponzi v. Fessender, 258 U.S. 254 (1921), the Attorney General is the chief law enforcement officer and possesses the "exclusive prerogative" (continued)

> We are aware that . . . the Executive Branch . . . may decide not to present the [contempt citation] to the grand jury (as occurred in the case of the officials of the New York Port Authority). . . .

Contrary to defendants' assertions, therefore, §194 does not require the United States Attorney to initiate a prosecution. For this reason, defendants cannot argue that the theory of Steffel v. Thompson is inapplicable to the present case.

Plaintiffs recognize that declaratory relief is not ordinarily available to permit a witness to challenge the validity of a congressional subpoena. As defendants point out, the "orderly and often approved means" of raising constitutional defenses to a subpoena normally requires presenting one's defense through the following process: review by the subcommittee, full committee, and full House of Congress, followed by referral to the United States Attorney and indictment or information. "Should prosecution occur, the witness' claims could then be raised before the trial court." Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972), cited in Defendants' Brief at 23. However, none of the

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**/ (continued from previous page)
to begin a criminal prosecution. United States v. Cox, supra, 342 F.2d at 190-91 (Wisdom, J. concurring). Because this power is constitutional in source, the Courts have consistently invoked the separation of powers doctrine to decline review of particular prosecutorial decisions. Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); Smith v. United States, 375 F.2d 243, 247 (5th Cir. 1967); Inmates of Attica v. Rockefeller, 477 F.2d 375, 379 (2nd Cir. 1973).

cases cited by defendants involved the peculiar facts present here, namely a completed legislative process which resulted in a contempt action against a top Executive Branch official.*/

There is another reason why declaratory relief is not only proper but necessary in the present case. The "regular procedure" for testing a witness' claims referred to in Sanders, 463 F.2d at 900, is not available. The witness in this case, Mrs. Gorsuch, was cited for contempt for withholding documents at the direction of the President and upon the advice of the Attorney General. Under these circumstances, it is questionable whether the Department of Justice could properly prosecute Mrs. Gorsuch for contempt.**/ Because the "regular procedure" for resolving this dispute is not available, declaratory relief is necesssary for its resolution.

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*/ Sanders and the cases cited in that opinion were all cases where "injunctive or declaratory relief has been sought with respect to an ongoing congressional investigation. . . ." Id. at 901 (emphasis added). Here congressional action is complete.

**/ The inability to prosecute Mrs. Gorsuch for contempt has several dimensions. As we have shown, pp. 34-35, supra, 2 U.S.C. §194 cannot impose a mandatory obligation to prosecute Mrs. Gorsuch. Since the Attorney General counseled the President to instruct Mrs. Gorsuch to withhold the documents in question, it would also raise serious ethical questions for the Department of Justice to undertake a discretionary prosecution. See Principles of Federal Prosecution, U.S. Dept. of Justice, Part B(1) (July 1980). And, because Article II makes criminal prosecution an exclusive responsibility of the Executive Branch in most situations, it is doubtful that Mrs. Gorsuch could be prosecuted by anyone who is not subject to the direction of the President. Finally, the criminal prosecution of an Executive official for complying in good faith with the President's instructions to withhold documents could well be unconstitutional in any event, since it imposes a heavy burden on the assertion of executive privilege. In this regard, it is significant that civil litigation remains available as an alternative means of resolving such inter-branch disputes. See Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

The extraordinary and compelling circumstances of this case strongly militate in favor of departing from the usual rule that the validity of a congressional subpoena can be tested only in defense of a criminal prosecution. Accordingly, an immediate and concrete controversy exists; a declaratory judgment is not only a proper method of review but indeed the best method to determine the legality of the Administrator's action.

D. The Political Question Doctrine Does Not Require Abstention

This case involves a dispute between the Executive and Legislative Branches over fundamental constitutional principles. The only way it can be resolved is through the intervention of the Judiciary. Under these circumstances, the political question doctrine does not require the Court to abstain from adjudicating the issues raised by this action.[*]

As noted above, a similar confrontation between the two branches was presented in United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977). There, the court considered political question principles at length in determining whether it was appropriate to intervene in the dispute between the two branches over a congressional subpoena. After noting that the courts had often resolved disputes concerning the allocation of power between the branches, 567 F.2d at 126, n.13, the court stated at 126:

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[*] Defendants disclaim any argument based upon the political question doctrine. Defendants' Brief at 45. Nevertheless, this argument is addressed here in the event the Court raises the question *sua sponte*.

> Where the dispute consists of a clash of authority between two branches, however, judicial abstention does not lead to orderly resolution of the dispute. No one branch is identified as having final authority in the area of concern.

If, the court went on to say, a stalemate results, judicial intervention is required to avoid the "detrimental effect on the smooth functioning of government." 567 F.2d at 126.

Abstention was rejected by the court in A.T.&T. because the court found those factors to be present. The identical factors are present here. As in A.T.&T., the Legislative Branch claims a power to investigate the manner in which an agency has administered a particular program. As part of that power, it contends that it has an unlimited right to any documents involved in that program. The Executive, on the other hand, as in A.T.&T., concedes that the Legislative Branch has the power to investigate, but contends that the right to investigate is not without bounds and cannot reach documents which, if disclosed, would impair its duty to faithfully execute the laws. Moreover, a stalemate has resulted over this dispute, since no further legislative action is possible. A.T.&T. stands for the clear proposition that when such a constitutional confrontation between the two branches has reached an impasse, the courts have a duty to intervene in order to provide for an orderly resolution of the dispute.

The Court of Appeals for this Circuit has reached essentially the same conclusion in two other cases involving a claim of executive privilege, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) and Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In Sirica, a claim of privilege was interposed in response to a grand jury subpoena while in Senate Select Committee, the claim was interposed in response to a congressional subpoena. In both cases the argument was made that judicial intervention was inappropriate because non-justiciable political questions were involved. That contention was rejected in each case, and in each case the court reviewed the merits of the privilege claim. Nixon v. Sirica, 487 F.2d at 716-718; Senate Select Committee v. Nixon, 498 F.2d at 728. The political question doctrine, therefore, does not preclude this Court from entertaining this action.

II. The Speech Or Debate Clause Does Not Bar This Action.

The Speech or Debate Clause does not bar this suit. The congressional action in question is complete, and the Court is in no way requested to interfere with any ongoing congressional activity. Moreover, in a decision fully applicable here, the Court of Appeals for this Circuit has held that a suit such as this is not barred by the Speech or Debate Clause. In United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977), the court permitted the Executive Branch to obtain judicial review of a congressional subpoena which sought sensitive national security information that was subject to a claim of executive privilege. The court noted that the intent of the Clause is primarily to protect members of Congress from "personal suit[s] against them." 567 F.2d at 130. Where that is not the case, "the Clause does not and was not intended to immunize Congressional investigatory actions from judical review." 567 F.2d at 129.

A. The Purpose of the Speech Or Debate Clause

The Speech or Debate Clause of the Constitution, Article I, Section 6, clause 1, provides:

> For any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place.

The fundamental purpose of the Clause is to "protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S 501, 507 (1972). In this regard, the clause has been expanded beyond a literal construction to include anything "generally done in a session of the House by one of its members relating to the business before it." Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). However, the Clause cannot be interpreted to cover conduct that is "in no way related to the due functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 1972 (1966). Thus, the Court has held that legislative acts covered by the Clause in addition to speech or debate are only those which constitute an "integral part of the deliberative and communicative process" of the Congress. Gravel v. United States, 408 U.S. 606, 625 (1972).

The Clause has been applied to bar two different types of suits against members of Congress. The first includes civil or criminal suits which seek to hold individual legislators liable for their legislative activities. Indeed, the prevention of such suits is the primary intent of the Clause. See United States v. A.T.&T., 567 F.2d at 130. This bar against criminal prosecution or civil damage actions against individual legislators preserves their independence when engaged in legislative activities.

The Clause has also been applied to prevent a second type of suit -- one which would directly interfere with the legislative process. Thus, for example, the Clause prevents a court from enjoining the implementation of a congressional committee's subpoena. Such a suit is barred because the relief would "impede congressional action" and "interfere with an ongoing activity by Congress." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509-510, n.16 (1975).

It should be emphasized, however, that the Clause bars only those suits which would have the effect of interfering with the legislative process in some way. Thus, for example, in Gravel v. United States, 408 U.S. 606 (1972), the Court held that the private publication by a Senator of materials received by a Senate Committee was not entitled to Speech or Debate protection because such an activity is not essential to the legislative process:

> As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." United States v. Doe, 455 F.2d at 760.
>
> Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. [408 U.S. at 625].

See also Doe v. McMillan, 412 U.S. 306 (1973).

Finally, the Speech or Debate Clause does not bar the determination by a court of the legality of the action of a person opposing a subpoena if the legislative process has essentially terminated. Thus, in Watkins v. United States, 354 U.S. 178, 208 (1957) and Barenblatt v. United States, 360 U.S. 109 (1959), the Court was required to fulfill its judicial function of determining the legality of declining to comply with a subpoena when the defendants were found in contempt under 2 U.S.C. §192 and prosecuted under 2 U.S.C. §194. Similarly in Senate Select Committee On Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), the Speech or Debate Clause was no bar to judicial resolution of an executive claim of privilege when the Committee brought suit to enforce the subpoena, even though that decision effectively prevented the committee from procuring information it requested. Moreover, if Congress orders the Sergeant-at-Arms to imprison a witness for failing to comply with a subpoena, a court clearly has the power under 28 U.S.C. 2241 et seq., to issue a writ of habeas corpus against the Sergeant-at-Arms and those imprisoning the witness, and to determine the validity of the recalcitrant witness' actions. See, Kilbourn v. Thompson, supra.

The overriding purpose of the Speech or Debate Clause is, therefore, not to immunize congressional actions from judicial review. It is not to be extended "beyond . . . its intended scope and its history, to include all things in any way related to the legislative process." United States v. Brewster, 408 U.S. 501, 516 (1972). To construe the Speech or Debate Clause as barring this suit would be inconsistent with this admonition because the relief sought here would in no way interfere with any ongoing legislative activity.

B. Since the Relief Sought Here Would Not Interfere With The Legislative Process, The Clause Is Not Applicable

This action will not interfere with the legislative process because that process has terminated. The full House has considered this matter and resolved to cite Mrs. Gorsuch for contempt. The contempt citation has been certified and delivered to the United States Attorney. It is, therefore, critically important to emphasize that a declaratory judgment in this action would no more interfere with any legislative processes than would judicial review of the same issues in the context of a criminal contempt proceeding. In each, the court would review the lawfulness of Mrs. Gorsuch's actions which gave rise to the contempt citation. Since it is well-established that Speech or Debate principles do not bar such review in the context of a criminal contempt proceeding, see Watkins v. United States, 354 U.S. 178 (1957); Barenblatt

v. United States, 360 U.S. 109 (1959), there is no reason why, in the compelling and unique circumstances present here, such principles should bar review in this case.

In arguing that the Speech or Debate Clause bars this action, defendants focus largely on the impropriety of the issuance of any injunctive or "coercive" relief against members of the House. While it is true that the original complaint in this action contained a prayer for injunctive relief, the amended complaint seeks declaratory relief only.*/ Much of the defendants' arguments are therefore no longer applicable. For example, defendants argue that Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), bars this suit because the Supreme Court there rejected the proposition that a court could "enter a 'coercive order' which in context would mean that the Subcommittee would be prevented from pursuing its inquiry by use of a subpoena to the bank." 421 U.S. at 512. Defendants' brief at 16-17. But in Eastland, injunctive and declaratory relief were sought immediately after the issuance of the Subcommittee subpoena. In that context, injunctive or declaratory relief would have effectively interfered with the ongoing investigation. Here, on the other hand, a declaratory judgment will produce none of the coercive effects that would have resulted had either an injunction or a declaratory judgment been entered in Eastland.

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*/ At the time the original complaint was filed, the contempt resolution had not been certified or delivered to the United States Attorney.

Indeed, as noted above, the situation here is similar to that in United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977). There, the United States filed suit and invoked executive privilege to prevent A.T. & T. from complying with a congressional subpoena which sought highly sensitive national security information in A.T. & T.'s possession. The House Subcommittee seeking that information intervened. It contended that Speech or Debate principles barred the suit because a judicial resolution of the dispute would interfere with its investigatory activities.

The Court of Appeals for this circuit flatly rejected this contention. After reviewing Watkins, Barenblatt and Senate Select Committee v. Nixon, the court stated:

> . . . individual members of Congress are not impermissibly 'questioned in any other place' regarding their investigatory activities merely because the validity and permissibility of their activities are adjudicated. . . . As is clear from Watkins, Barenblatt and Senate Select Committee, however, the [Speech or Debate] Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute. . . . [567 F.2d at 129].

The court, therefore, concluded that judicial intervention was not precluded by Speech or Debate principles because those principles are primarily intended to protect individual legislators from personal suits against them for legislative activities. Where that is not the case, "the Clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny." 567 F.2d at 130.

C. The Clause May Not Be Asserted To Immunize Non-Legislative Activities.

It is well-established that judicial review of a congressional action is available if employees of the Congress take steps to implement that action beyond the purely legislative sphere. As noted by the defendants in their brief at p. 15, the defendant Clerk of the House certified the contempt resolution to the United States Attorney for prosecution under 2 U.S.C. § 194. Moreover, the defendant Sergeant-at-Arms of the House[*/] delivered the contempt citation to the United States Attorney. Each of these defendants, therefore, was responsible for carrying out the House resolution that the contempt citation against Mrs. Gorsuch be certified and delivered to the United States Attorney for prosecution. In these circumstances, the Supreme Court has held that suits can be maintained against the congressional employees in order to review the legality of the underlying legislative order pursuant to which they were acting.

This principle was recognized by the Court in Powell v. McCormack, 395 U.S. 486 (1969). There the House of Representatives passed a resolution excluding Rep. Powell from the House. Pursuant to that resolution, the Clerk of the House threatened to refuse to perform the duties due a Representative, the Sergeant-at-Arms refused to pay his salary and the Doorkeeper refused to admit him to the House Chamber. Powell filed suit against certain Congressmen as well as these employees challenging the legality of the House's exclusion order. The defendants moved to dismiss,

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[*/] The Sergeant-at-Arms was mistakenly omitted from the Amended Complaint. We have, therefore, moved to amend the Complaint to join him as a party defendant to this action.

arguing that the Speech or Debate Clause protected both the legislators and their employees from suit. The Supreme Court refused to dismiss the employees and reaffirmed the doctrine that:

> . . . although an action against a Congressman may be barred by the Speech and Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts . . . That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision. [395 U.S. at 504].

The Court therefore permitted the suit to proceed against the House employees in order to review the legality of the exclusion order adopted by the members of the House.

In reaching this conclusion, the Court specifically reaffirmed its decision in Kilbourn v. Thompson, 103 U.S. 168 (1881). There, the House had passed a resolution ordering the Sergeant-at-Arms to arrest and imprison a witness who had refused to respond to a House Committee subpoena. The witness filed a false imprisonment suit against certain members of the House as well as against the Sergeant-at-Arms who had actually executed the arrest warrant, contending that the House resolution was unconstitutional. The Court held that while the members were immune from a damage action based upon their legislative act, the Sergeant-at-Arms did not share in that immunity, even though he had merely implemented the House resolution. Indeed, the Court emphasized the importance of permitting the case to proceed against the House employee to ensure that the House's action not escape judicial review:

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U.S., at 199.

The instant case is indistinguishable from Powell or Kilbourn in this regard. Plaintiffs here, as in Powell and Kilbourn, seek judicial review of a House resolution. Similarly, as in Powell and Kilbourn, the legislative process has terminated so that judicial intervention could not interfere with any ongoing legislative activity. Moreover, as in Powell and Kilbourn, the implementation of the resolution here required the participation of House employees. Without the certification and delivery of the contempt citation to the United States Attorney, the House resolution that Mrs. Gorsuch be prosecuted for contempt would have had no effect. This case, therefore, can proceed against the House employees who carried out the House resolution, just as the Powell and Kilbourn actions were permitted against the House employees who implemented the House resolutions challenged in those cases.

Moreover, contrary to the House's assertions, this conclusion is perfectly consistent with the Supreme Court's Speech or Debate analysis in cases such as Gravel v. United States, 408 U.S. 606 (1972). In Gravel, the Court emphasized that Speech or Debate immunity attaches to either Members or employees if the action they took was a protected legislative act. Thus, the Court held that

> . . . the Speech or Debate Clause applies not only to a Member but also his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself. [408 U.S. at 621]

Therefore, to determine whether the House employees here are immune from suit, it is necessary to decide whether they performed "protected legislative acts."*/ As noted by the Court in Gravel, and in United States v. Brewster, 408 U.S. 501 (1972), members of Congress engage in a wide range of unprotected activities, including constituent "errands", communicating with federal agencies regarding their administration of programs, news releases and speeches outside the Congress. Indeed, the Court held in United States v. Johnson, 383 U.S. 169 (1966), that the Speech or Debate Clause did not immunize a Member's attempt to influence the Department of Justice.**/ In light of the wide range of congressional activities, the Court in Gravel cautioned that:

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*/ The Gravel analysis suggests that a distinction between legislators and legislative employees may not be appropriate, particularly in an action for declaratory relief. But see Powell v. McCormack, 395 U.S. at 517-18. Under the Gravel approach, however, plaintiffs would be entitled to seek declaratory relief against all defendants who participated in conduct outside the scope of "protected legislative acts," including Members of Congress.

**/ Had the member sought to influence the Department of Justice solely through legislative activities such as floor speeches, committee hearings, or voting on a resolution or bill, Speech or Debate immunity would have attached. Similarly, here, had the defendants sought to influence the Executive Branch through such legislative activities, they would be immune from suit. However, when Congress took the unprecedented step of certifying the contempt resolution to the United States Attorney and purporting to require him to prosecute Mrs. Gorsuch, it went beyond the legislative arena as did the member in Johnson who similarly sought to influence the Executive Branch through extra-legislative means.

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. [408 U.S. at 625]

The test has been applied to immunize the issuance of a duly authorized congressional subpoena, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), and the preparation of a Committee report, Doe v. McMillan, 412 U.S. 306 (1973), because those activities were held to be integral parts of Congress' deliberative and communicative processes. However, the private publication or public distribution of materials received or prepared by a congressional committee have been held to be unprotected activities. Gravel v. United States, supra; Doe v. McMillan, supra. Such activities are simply not essential to the internal processes of the Congress.

Under the Gravel analysis, the certification and delivery of the contempt citation to the United States Attorney in an attempt to compel criminal prosecution is not a protected legislative activity.*/ Those acts have nothing to do with "speech or debate" nor are they an integral part of the House's internal deliberative and communicative processes. Instead, the certification[*/] and delivery of the contempt citation constitute an effort to enforce the legislative decision, just as the physical exclusion of Rep. Powell by the House doorkeeper in Powell and the arrest of the witness in Kilbourn constituted efforts to enforce the legislative decisions reached in those cases.[**/] As the Court stated in Eastland, 421 U.S. at 508, the arrest by the Sergeant-at-Arms of a witness who had been held in contempt was unprotected because it was not "essential to legislating." For the same reason, the certification and delivery in the present case are not protected legislative activities. Therefore, although the Speech or Debate Clause may immunize the Member defendants for their legislative activities in this case, that immunity extends only through the vote on the contempt resolution by the House. Beyond that point, the legislative process ends and the enforcement process begins; any acts by the defendants beyond that vote can therefore form the basis for judicial resolution of the underlying controversy as in Powell and Kilbourn.

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*/ The Speaker's letter of January 5, 1983 (Harris Dec., Exhibit C), which explicitly seeks to compel the United States Attorney to bring a criminal prosecution against Mrs. Gorsuch, is also not a protected legislative act. See United States v. Johnson, 383 U.S. 169 (1966).

[*/] The House argues that the certifiction of bills and resolutions are protected legislative actions and that the Department of Justice took this position in a recent case. See Defendants' Brief at 15, 20. Ordinarly, this proposition is accurate because the certification is part of the process by which a bill or resolution becomes law. Here, however, 2 U.S.C. § 194 provides that certification is a necessary step in obtaining criminal prosecution by the United States Attorney, an activity which is not part of the process by which a bill or resolution becomes law.

[**/] Indeed, the statutes pursuant to which the contempt citation was certified and delivered, 2 U.S.C. § 192 and 194, were enacted to provide Congress with an additional means to enforce its contempt resolutions as an alternative to the method employed in Kilbourn. See Cong. Globe, 34th Cong., 3d Sess. 427 (remarks of Rep. Davis) (the statute "makes a mere substitution of a judicial proceeding for the ordinary proceeding by attachment by a parliamentary body"), quoted in Defendants' Brief, at 28-29.

III. Mrs. Gorsuch Properly Withheld The Documents In Dispute Under A Claim Of Executive Privilege

The Executive has asserted a privilege to withhold only a scattering of hard-core, enforcement sensitive documents. That action was ordered by the President because he and the Attorney General believed disclosure of the documents could compromise effective law enforcement, a responsibility given the Executive by the Constitution. The defendants have done nothing to satisfy their burden of showing that the privilege was wrongly asserted or that they had a compelling need for the documents.

A. The Claim of Executive Privilege Is Rooted In Separation Of Powers Principles And Should Be Reviewed By This Court

Executive privilege was invoked here in order to preserve the fundamental principle of separation of powers, "which is at the heart of our Constitution." Buckley v. Valeo, 424 U.S. 1, 119 (1976) (per curiam). The judiciary has indeed often checked actions by the other branches which represent

> an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.

Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 425 (9th Cir. 1980). See Buckley v. Valeo, 424 U.S. 1, 118-24 (1976) (per curiam); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952);

Myers v. United States, 272 U.S. 52 (1926). Judicial intervention in these disputes was essential in order to maintain the delicate balance of powers among the branches created by the constitution.

Congress does have the power to investigate. That power is broad, but it is not without limitations. Watkins v. United States, 354 U.S. 178, 187 (1957). As the Supreme Court stated in Barenblatt v. United States, 360 U.S. 109 at 112:

> Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. (emphasis added).

When the Congress uses its power to investigate in a manner that threatens to impair the Executive's ability to fulfill constitutional responsibilities, as here, the courts have stepped in to resolve the dispute. As the Court of Appeals for this Circuit stated in Senate Select Committee v. Nixon, 498 F.2d 725, 729 (D.C. Cir. 1974), in which a claim of executive privilege was similarly invoked in response to a congressional subpoena, "it is the responsibility of the courts to decide whether and to what extent executive privilege applies." See also United States v. Nixon, supra. The Court of Appeals, after a thorough review of the issues raised, concluded that the materials in question were, indeed, subject to a claim of executive privilege. The court further held that the committee had failed to demonstrate that the materials were "demonstrably critical to the responsible fulfillment of the Committee's functions" so as to overcome the claim of privilege. 498 F.2d at 731.

This case is like Senate Select Committee. As will be demonstrated below, the documents are subject to a valid claim of privilege. Since the committee has failed to demonstrate any compelling investigative need for them, the investigative interests of the Legislative Branch must yield to the necessity for the Executive to preserve its ability faithfully to execute the law.

B. Executive Privilege May Be Invoked For Sensitive Documents In Open Law Enforcement Files

Here the Subcommittee's demands threatened damage to a fundamental responsibility of the Executive -- the obligation to enforce the laws. Therefore, in response to the demands of the congressional subpoena here at issue, Mrs. Gorsuch followed the instructions of the President in interposing a claim of executive privilege to protect from disclosure materials that consist of

> "sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals."

Perry Dec., Exhibit E at 4. This claim was based on a determination that dissemination of such documents to the public or to Congress would impair the Executive's constitutional duty to ensure that the laws be faithfully executed. See U.S. Const., Art. II, § 3; United States v. Nixon, 418 U.S. 683 (1974). Accordingly, the claim of executive privilege has been properly asserted.

The doctrine of executive privilege defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory processes of the legislative and judicial branches. See United States v. Nixon, 418 U.S. 683 (1974). The privilege protects two different constitutional interests. Executive privilege protects material where disclosure would either significantly impair the performance of the constitutional responsibilities of the Executive or where it would interfere with its functioning as an independent branch of government. Id.

Executive privilege may properly be invoked to protect several distinct aspects of the Executive's constitutional responsibilities. It may be invoked, for example, where there is a danger that disclosure of the material will impair the conduct of foreign relations or the national security. See e.g., United States v. Reynolds, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978). See also United States v. Nixon, 418 U.S. at 706. It may also be invoked to shield confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, unless there is a strong showing that access to the documents is critical to the responsible fulfillment of a constitutional function. See Nixon v. Administrator of General Services, 433 U.S. 425, 441-55 (1977); United States v. Nixon, 418 U.S. 683, 711-12 (1974); Senate Select Committee v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974) (en banc). Similarly, it may be invoked to protect from disclosure investigative files compiled for law enforcement purposes. See Ass'n For Women In Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977).

The assertion of a claim of executive privilege is based on the practical need for the confidentiality of communications within the Executive Branch to carry out its constitutional responsibilities, as well as the doctrine of separation of powers that provides that each branch of government is "suprem[e] . . . within its own assigned area of constitutional duties." United States v. Nixon, 418 U.S. at 705. In United States v. Nixon, the Court recognized the need for confidentiality within the Executive Branch to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, unencumbered by fear of disclosure or intrusion by the public or the other branches of government. It stated that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. at 705. Such "temper[ed] candor" in executive deliberations would impede the President's performance of his constitutional duty to exercise the Executive powers granted in Art. II, § 3 of the Constitution. See Nixon v. Administrator of General Services, 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. at 705.*/

Because its invocation is infrequently challenged in court, there has not been much litigation in the area of executive privilege. However, courts have long recognized the need for the privilege in the area of civil discovery with respect to "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd mem. sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979, cert denied, 389 U.S. 952 (1967). See Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958).

In addition, the courts have recognized that a related privilege, commonly known as the law enforcement evidentiary privilege, protects from disclosure investigative files compiled for law enforcement purposes. Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977). See United States v. A.T.&T., 86 F.R.D. 603, 639-42 (D.D.C. 1979). Courts have long recognized a strong public interest in minimizing the disclosure of documents which would tend to reveal law enforcement strategies, investigative techniques or sources. See e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224-25 (1978); Black v. Sheraton Corp.,

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*/ The Supreme Court and lower federal courts have made clear that the presumption of confidentiality accorded executive communications is intended to protect not only the substance of sensitive communications but the integrity of the decision-making process within the Executive Branch as well. See Nixon v. Administrator of General Services, supra; Senate Select Committee v. Nixon, supra; Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc).

564 F.2d at 535, 536; Center for National Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir.), cert. denied, 409 U.S. 882 (1972); Jabara v. Kelly, 62 F.R.D. 424 (E.D. Mich. 1974); Philadelphia Resistance v. Mitchell, 63 F.R.D. 125 (E.D. Pa. 1972). See generally 2 Weinstein's Evidence ¶509[07] (1975). This privilege is rooted in the same concerns as the privilege accorded to intra-governmental documents -- the need to minimize disclosure of documents the revelation of which would both impair the functioning of the Executive Branch in its law enforcement efforts and impair its ability to operate as an independent branch of government. See Black v. Sheraton Corp. of America, 564 F.2d at 542.

Effective law enforcement relies heavily on the assurance of confidentiality within the enforcement process. The need for confidentiality is even stronger, of course, while enforcement is being carried out and enforcement policies and strategies are still being developed. Without that assurance of confidentiality, efforts of the Executive Branch to enforce the law effectively would be undercut by disclosure of sensitive investigative techniques, methods or strategies, forewarning of suspects under investigation, deterrence of witnesses from coming forward, endangering the safety of confidential informants or prejudicing the rights of those under investigation. Moreover, disclosure of investigative files in a particular case could interfere with ongoing administrative enforcement proceedings and could obviously prejudice or harm the government's case. See e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224-25 (1978); Center for National Policy v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Aspin v. Department of Defense, 491 F.2d 24, 29-30 (D.C. Cir. 1973); Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir.), cert. denied, 409 U.S. 882 (1972); Kinoy v. Mitchell, 67 F.R.D. 1, 11-12 (S.D. N.Y. 1975). Indeed, the government may shrink from conducting a thorough investigation if there is a risk that the information gathered may be prematurely disclosed. Perhaps most importantly, the fear exists that the integrity, impartiality and fairness of the law enforcement process as a whole would be damaged if sensitive material were distributed beyond those persons necessarily involved in the investigation and prosecution process. See Perry Dec., paras. 17, 18, 24, 32 and 33; Dinkins Dec., paras. 6-9.[*/]

The disclosure of open law enforcement files could also seriously impair the Executive Branch's functioning as an

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[*/] Congress itself has recognized the vital importance for such a privilege in the Freedom of Information Act, which greatly expanded information that government agencies must make available to the public. That Act specifically contains an exemption for certain types of investigatory records compiled for law enforcement purposes. 5 U.S.C. §552(b)(7). As the Second Circuit concluded in analyzing the purposes behind the §552(b)(7) exemption:

> [the Senate and House Reports] indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement. Frankel v. SEC 460 F.2d 813 817 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

independent branch of government. Were the documents at issue here disclosed to congressional subcommittees, members of Congress would become partners in the enforcement process, possessing the information necessary to participate in or interfere with ongoing enforcement actions. The Executive Branch would lose control of the documents and thus would be unable to ensure that the strengths and weaknesses of the government's case not be revealed to the targets of the case under development.

As stated by the Attorney General, in explaining the bases for the invocation of the privilege in the instant case, there is ample historical precedent for the assertion of privilege to preclude disclosure to the Congress of sensitive memoranda in files of ongoing law enforcement cases.

> The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

Perry Dec., Exhibit E at 5.

Executive privilege has been invoked throughout the history of the United States by virtually all of our Presidents in response to Congressional demands for information. See The Committee Report, p. 90 (Memorandum for the Attorney General. History of Executive Privilege vis-a-vis Congress, December 14, 1982). Many of these claims were made to prevent the disclosure of investigatory files. See id., p. 94-95 (President Monroe); p. 96-97 (President Jackson); p. 99-100 (President Tyler); p. 103

President Buchanan); p. 103-04 (President Lincoln); p. 104 (President Johnson); p. 105 (President Cleveland); p. 106-07 (President Theodore Roosevelt); p. 107 (President Coolidge); p. 107-08 (President Franklin Roosevelt); p. 109-110 (President Truman). See also Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1400-02 and nn. 61-67.

Thus, it has been the general policy of the Executive Branch throughout this Nation's history to withhold from Congress sensitive documents from open law enforcement files except in the most extraordinary circumstances. For example, President Tyler invoked executive privilege against a request by the House of Representatives to the Secretary of War to produce investigatory reports submitted to the Secretary by Lieutenant Colonel Hitchcock concerning his investigation into frauds perpetrated against the Cherokee Indians. See The Committee Report, p. 99-100. Similarly, President Truman invoked the privilege and directed officials not to disclose files bearing on the loyalty of certain State Department employees after the Senate subpoenaed those files. See id. at 109-110. And President Franklin Roosevelt directed Attorney General Jackson to invoke the privilege concerning a House request to view certain FBI records. See id. at 107-08. As Attorney General Robert Jackson stated to Congress over forty years ago:

> It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that

> all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that that laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. A.G. 45, 46 (1941).

Attorney General Smith also relied upon the reasoning of former Assistant Attorney General Thomas F. Kauper, who stated:

> The Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Exhibit F, p. 3.

The Attorney General found that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. He agreed with the position stated by Attorney General Jackson in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee.

As the Attorney General noted, Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

> [S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination _to_ the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents.

Perry Dec., Exhibit F, p. 6.[*] There are, therefore, a number of compelling reasons why documents such as those at issue here must remain privileged and why "[a]t bottom, the President has the responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch." Id., p. 7.

C. The Documents At Issue In This Case Are Properly Subject To A Claim Of Executive Privilege

The administration of the Superfund Act involves a continuous process of investigation and law enforcement efforts. The process may ultimately result either in an administrative action, criminal prosecution or civil litigation. As such, the enforcement functions of EPA under the Superfund are similar to those functions carried out by the FBI or the Department of Justice in a criminal prosecution. Accordingly, the same concerns for protecting the law enforcement investigatory files of those agencies are equally applicable with respect to the enforcement of the Superfund program. Cf. Center for National Policy Review v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974).

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[*] Guarantees of confidentiality by the Levitas Subcommittee can not overcome the concern over the integrity of law enforcement files in this instance either. Rule XI, cl.2, § 706c of the Rules of the House of Representatives provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all members of the House shall have access thereto . . . ." (emphasis added). Thus, Subcommittee access to the documents is equivalent to access by all of the members of the House of Representatives and, accordingly, to the general public. Nor will an offer to receive the privileged documents in "executive session" pursuant to Rule XI, cl.2, § 712 of the Rules of the House of Representatives alleviate that concern. The only protection given the documents by that provision is that they shall not be made public without the consent of the Subcommittee. Since such consent could be given any time in the future, this assurance fails to provide the Executive the protection and control to which it is constitutionally entitled.

Furthermore, there is always the possibility that information will be leaked to the public by House members or their staffs. Although the same danger exists in the Executive Branch, the Executive can assert control over Executive Branch employees through a variety of potential sanctions, including loss of employment. With disclosure of documents to Congress, the Executive Branch loses that power to ensure the confidentiality of its records. Ultimately, it is the Executive's responsibility to enforce the law and to maintain the confidentiality of information that is necessary for this purpose.

The documents which form the focus of this dispute are all part of open law enforcement case files. A number of cases are in early stages of investigation, where public disclosure could be particularly destructive. Many of the documents contain EPA's proposed settlement strategies, including the bottom-line figure it would accept from a particular responsible party. The memoranda also describe, in detail, anticipated defenses, the elements of proof required in a given case, the legal issues involved and possible precedential impact. Also included are lists of potential witnesses and descriptions of available evidence. Perry Dec., para. 16.

Threatened disclosure of these documents raises serious fears. The documents in question all stem from ongoing enforcement actions which EPA and/or the Department of Justice are developing for litigation or which are actually being litigated in the courts. Thus, disclosure of these documents would reveal the strategy of the investigation and forewarn the suspects under investigation. It would also undercut the investigation of the hazardous waste sites by premature disclosure of the facts of the government's case. Such information would be of obvious benefit to the targets of the investigation and destroy the adversarial element crucial to the law enforcement process. For example, EPA would be at an enormous disadvantage in attempting to negotiate an environmentally appropriate settlement agreement with a party who knew EPA's bottom-line settlement position, its negotiation strategy, and its perception of the strengths and weaknesses in the government's case. In addition, the withheld documents identify potential targets for enforcement actions; the disclosure of those names could have great impact upon those persons identified, by harming the reputation of possibly innocent persons.

Moreover, the information sought is not factual data, which has already been made available to the Subcommittee. Rather, the documents withheld consist of legal and strategic analyses of individual cases, lists of potential witnesses, settlement considerations and similar materials. These are the kind of work product documents that would be immune from production under Fed. R. Civ. Proc. 26(b)(3).

Thus, in this instance, the need for the privilege is very strong. As demonstrated below, Congress cannot overcome the presumption of the privilege in this instance because it cannot establish a compelling and specific need for the documents.

D. Congress Has Not Shown A Specific And Compelling Need For Disclosure Of The Documents That Overcomes The Presumption Of Executive Privilege

Defendants seem to assert an absolute right to any documents held by the Executive; at least, they insist that the House should be the sole arbiter of what documents the Executive may withhold.

As discussed above, that simply is not the law. Instead, while executive privilege is not absolute, it may be overcome only by a specific showing that Congress has a compelling need for the documents in question. See pp. 54-55, supra. In some cases, there may be a need for delicate balancing of competing interests. Here, however, the decision is an easy one because the Subcommittee has made no showing whatsoever of a specific need for the documents in question.

The power of Congress to conduct investigations is inherent in the legislative process. When this "power of inquiry" is directed at the Executive Branch, however, it is bounded by principles imposed by the separation of powers doctrine. See Senate Select Committee v. Nixon, supra. Thus, the power of Congress to investigate is subject to claims by the Executive that the release of certain information would impair the President's obligation to discharge the responsibilities assigned to him by the constitution. See p. 54, supra. When such a claim is interposed, it cannot be overcome absent a showing of some compelling need for the information sought. See Senate Select Committee v. Nixon, supra, 498 F.2d at 730; United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977). Indeed, this Circuit has held that the general oversight and fact-finding functions of a particular congressional committee were insufficient to override the interests of the Executive Branch in protecting privileged information from disclosure. See Senate Select Committee v. Nixon, supra, 498 F.2d at 732. The Court in Senate Select Committee contrasted the general congressional interest in oversight and fact-finding with the specific and compelling need for disclosure in the face of a grand jury subpoena, such as that involved in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

The subcommittee here has not and indeed cannot show any need -- much less any compelling need -- for the withheld documents sufficient to overcome the valid claim of privilege invoked by the Executive Branch. The Subcommittee issued the subpoena in question in order "to review the integrity and effectiveness of EPA's enforcement program and to evaluate the adequacy of existing law." The Committee Report, p. 61. (Legal Memorandum of the General Counsel to the Clerk of the House of Representatives to Chairman Levitas Regarding Executive Privilege, December 8, 1982). The information requested is very broad in scope and the reasons for the request are very general. It is difficult to understand why the withheld documents, a small number of sensitive materials from open law enforcement files, are necessary to enable the Subcommittee to conduct its investigation. What is critical, however, is that the House cannot possibly make a showing that they are necessary because the House has not reviewed the documents actually made available to it. In fact, the Subcommittee actually refused to inspect the documents produced. Perry Dec., para. 25. Since the Subcommittee refuses to inspect the tremendous bulk of material that has been offered, it cannot possibly show any compelling need for the miniscule number of documents that have been withheld.*/

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*/ Moreover, the Subcommittee has not shown that whatever information it may have wanted from EPA could not have been obtained by some means other than the production of sensitive law enforcement documents from open Superfund Act enforcement files.

Moreover, the access that has been denied to the Subcommittee is only temporary. EPA has offered to turn over memoranda in the enforcement files as they lose their enforcement sensitivity. The Subcommittee has failed to demonstrate why its need to view these documents is critical at this point and cannot wait until the sensitive nature of the documents has abated.

Furthermore, the documents that have been made available to the Subcommittee may well fulfill its legislative needs. They consist of notes and internal memoranda from both open and closed cases involving enforcement of the Superfund. The documents include data on the amounts, nature, and origin of wastes present at hazardous waste sites; correspondence between EPA and the generators of the hazardous waste; records of interraction with state and local government officials; correspondence with responsible parties, contractors, state officials and representatives of other federal agencies; memoranda discussing the allocation of monies to particular sites by EPA; cooperative agreements arranged with the states involved; and memoranda reflecting the process of having the Superfund Office begin working on a site while initiating settlement negotiations with the contractor. Perry Dec., para. 16. A review of these materials would certainly enable the Subcommittee to conduct a detailed and comprehensive investigation of the adequacy of EPA's Superfund enforcement efforts. They reflect the various steps that have been taken concerning numerous hazardous waste sites. An evaluation of the effectiveness of the law as it has been applied and implemented by EPA clearly may be culled from these documents.

Accordingly, defendants have not and cannot meet their burden of demonstrating a specific, articulable need for the documents in question that would overcome the presumption of the asserted privilege. They have not even attempted to demonstrate such a specific need nor attempted to accommodate the interests of confidentiality required by the Executive in its law enforcement efforts. Instead, they continue to rely on the Subcommittee's generalized request for production of documents, failing to recognize that such a request is insufficient in and of itself to overcome the constitutionally protected interests of another branch of the government. Since defendants cannot establish any compelling need for the documents in question sufficient to overcome the claim of privilege, the Court should enter a judgment declaring that the Administrator acted lawfully in refusing to disclose them to the Subcommittee.

CONCLUSION

For all of the foregoing reasons, the plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA)
)
Plaintiff,)
) Civil Action
v.) No. IP 80-457-C
)
SEYMOUR RECYCLING CORP.,)
et al.,)
)
Defendants.)

MEMORANDUM

This matter comes before the Court for consideration of a proposed Consent Decree which the United States has lodged with the Court. The proposed Consent Decree provides for a surface cleanup of the approximately 60,000 barrels of toxic chemicals, bulk storage, and contaminated soil at the Seymour Recycling Site in Seymour, Indiana.

The United States filed the original complaint in this action on May 19, 1980, alleging violations of Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973 and Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321 against various parties including those who owned and operated the Seymour Recycling Site. Named defendants answered the complaint, and discovery proceeded.

On October 26, 1982, the United States filed with this Court an amended complaint adding additional allegations as to the original defendants under the Comprehensive Environmental Response, Compensation, and Liability Act (known as "CERCLA" or "Superfund"), 42 U.S.C. § 9606 and § 9607, enacted after the filing of the original complaint. In addition, the United States named in the amended complaint 24 new defendants, who are alleged to have "generated and caused to be transported solid and hazardous wastes and hazardous substances to the Seymour Site for handling, storage, treatment, or disposal." Motions to intervene were filed by the State of Indiana and the County of Jackson on October 26, 1982. On the same day the United States, the State of Indiana, the County of Jackson, Indiana, the City of Seymour, Indiana, the Board of Aviation Commissioners of Seymour, Indiana, and the 24 companies who were the new defendants added by the amended complaint filed a proposed Consent Decree with the Court.

This Consent Decree provides a mechanism by which the surface cleanup of the Seymour Recycling Site may promptly occur. The Decree provides that each of the 24 companies shall, within 15 days after the entry of the Decree, pay to the Seymour Site Trust Fund, established at a bank in Indianapolis, the sum for that company which is shown in Exhibit A to the

Decree.[1] The Trustees of the Fund shall use the money in the Trust Fund to pay Chemical Waste Management, a firm specializing in hazardous waste removal, to perform the surface cleanup at the Seymour Site. The precise scope of work to be done by Chemical Waste Management is set forth in detail in Exhibit B to the Consent Decree. The Decree also provides that Chemical Waste Management shall be responsible for the completion of the work regardless of its ultimate actual cost and that Chemical Waste Management shall purchase a performance bond in the amount of $15,000,000, which bond shall further assure completion of the work. The Decree specifies the obligations of Chemical Waste Management to purchase and to maintain in force insurance policies to protect the United States, the State and the public. It is contemplated that this project shall take approximately one year to complete. The Decree provides for continuing observation and monitoring of the progress of the work by the United States and the State as well as their approval of the satisfactory completion of the work.

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[1] The 24 companies and the amount which each shall pay is as follows: International Business Machines Corporation -- $2,241,001; General Motors Corporation -- $1,032,961; E.I. du Pont de Nemours & Company, Inc. -- $682,805; General Electric Company -- $665,297; Western Electric Company, Inc. -- $385,172; United Technologies Corporation -- $350,156; Atlantic Richfield Company on behalf of The Anaconda Company, Anaconda Wire & Cable Company, Anaconda Aluminum Company, Anaconda Industries, and Anaconda Magnet Wire -- $245,109; Borg-Warner Chemicals, Inc. -- $245,109; RCA Corporation -- $175,078; Bemis Company Inc. -- $175,078; Ford Motor Company -- $175,078; Whirlpool Corporation -- $140,062; McDonnell Douglas Corporation -- $105,047; Dow Corning Corporation -- $105,047; Pennwalt Corporation -- $100,000; Owens-Illinois, Inc. -- $100,000; The Procter & Gamble Company -- $100,000; General American Transportation Corporation -- $100,000; American Can Company -- $100,000; Olin Corporation -- $100,000; AM General Corporation -- $100,000; Cummins Engine Company Inc. -- $100,000; NCR, Corp. -- $100,000; Waste Resources of Tennessee, Inc. (an affiliate of Chemical Waste Management, Inc.) -- $100,000.

The Decree contains a provision requiring the preservation of documents relating to their business transactions with Seymour Recycling Inc. by the 24 companies. It contains a provision by which the United States, the State and the local governments covenant not to sue, execute judgment or take any civil judicial or administrative action against the 24 companies.

At the time of lodging, the Court set a hearing on the Consent Decree for November 10, 1982. On October 29, 1982, pursuant to its regulations published in 28 CFR 50.7, the United States Department of Justice published notice in the Federal Register, 47 Fed. Reg. 49107, of the lodging of the Consent Decree and invited public comment on it. The public comment period which is normally thirty (30) days was shortened to ten (10) days, pursuant to these regulations, because in the judgment of the Department of Justice there was a need to begin the surface cleanup expeditiously to abate a serious public health hazard because the advent of winter in the Seymour area could adversely affect the ability of the contractor to begin work at the Site.

In response to the Federal Register notice, comments were received from sixteen corporations. No comments were received from any individual citizens. On November 10, the United States filed with the Court copies of comments which it had received as well as its Response to those comments.

At the November 10 hearing, the United States explained the background to the Decree, and all interested persons, including those who were objecting to the entry of the Decree and were not a party in the action, were provided with an opportunity to participate in the hearing and to present their various positions to the Court. At this hearing, representatives of several objecting companies made statements to the Court. At the conclusion of the hearing the Court indicated, in response to objections that the comment period was too short, that the period for public comment would be extended to November 26, 1982, and that a further hearing would be scheduled by the Court for November 30. Several additional comments were received during this period. These were filed with the Court along with the Response of the United States to the Comments.

At the hearing on November 30, the Court once again permitted all interested persons, including those who were not parties in the action, to participate and to present any objections which they might have to the Decree. Again, several objectors made statements to the Court. There were no requests made for formal intervention, notwithstanding the government's statement that it would not oppose such intervention. Those participating in the hearing on November 30 included, in addition to the United States, representatives of the City of

Seymour and the Seymour Aviation Board, the State of Indiana, the Seymour Chamber of Commerce, the League of Women Voters of Seymour, representatives from companies within the group of 24, and representatives of companies opposing the decree. The United States presented sworn testimony from an official of Chemical Waste Management, from an official of the Environmental Protection Agency of the United States Government, and from two officials from the State of Indiana. An opportunity was provided for cross-examination of these witnesses. Finally, in addition to the materials submitted by the Department of Justice and the information presented at the hearings on November 10 and November 30, a number of comments about the Consent Decree were submitted directly to the Court. The United States filed its Supplemental Response to Comments as it is required to do so by its regulations. See 28 C.F.R. 50.7. After consideration of the comments, the United States continues to advocate the entry of the proposed Decree and gives its consent to the entry of the Decree.

The Court has concluded, based upon a careful review and consideration of all the information presented to it, that the Court should approve the Consent Decree. The surface cleanup authorized by this Decree is a very valuable and important part of the overall cleanup of the Seymour Site, which is in the public interest and particularly in the interest of those citizens affected by the Site. The Court is persuaded that time is of the essence in commencing this cleanup before the onset of winter. Accordingly, this cleanup should proceed as promptly as possible without any further delay.

In deciding whether to approve a proposed decree, a court must inquire whether the decree is consistent both with the Constitution and with the mandate of Congress. See United States v. Kitchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alaska 1977); United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). Second, the court "must assure itself that the terms of the decree are fair and adequate." See United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. at 1072. Finally, the court must inquire whether the settlement is a reasonable one. See In re Corrugated Container Antitrust Litigation, 659 F.2d 1322, 1325 (5th Cir. 1981), cert. denied, 102 S.Ct. 2283 (1982), cert. denied, 102 S.Ct. 2308 (1982). The underlying purpose of the court in making these inquiries is to determine whether the decree adequately protects the public interest. United States v. Ketchikan Pulp Co., supra, 430 F. Supp. at 86. The court "must eschew any rubber stamp approval in favor of an independent evaluation," United States v. Hooker Chemicals and Plastics Corp., supra, 540 F. Supp. at 1072, but because of the clear public policy favoring settlements the court must not substitute its judgment for that of the parties. See Airline Stewards v. American Airlines, 573 F.2d 960, 963 (7th Cir. cert. denied, 439 U.S. 876 (1978).

(1) Legality. With regard to the factors of legality and constitutionality, no objection has been raised to the entry of the Decree. Those statutes under which the amended complaint has been filed empower the United States to bring enforcement actions. See 42 U.S.C. § 9606, 42 U.S.C. § 6928, 42 U.S.C. § 1321(e). Furthermore, the authority of the United States and the Attorney General to compromise during litigation is well established. See United States v. Hooker Chemicals and Plastics Corp., supra, United States v. Kitchikan Pulp Co., supra. Here the Consent Decree is not violative of any law; indeed, it furthers compliance with the statutes under which the action was brought, most particularly with Superfund. In addition, all of the parties to the Decree have consented to the jurisdiction of the Court for the purposes of this Decree.

(2) Fairness. With respect to the rights and obligations of the parties consenting to the Decree, there is no objection as to fairness. All of these parties have urged its entry. This Court has, however, looked beyond the parties consenting thereto and considered the arguments raised by non-parties, both in comments filed with the Department of Justice and in arguments presented to this Court that the entry of the Decree is unfair to them. However, no objecting party requested an opportunity to intervene in this action to offer any evidence of alleged unfairness nor asked to cross-examine any witness.

No citizen of Seymour has objected to the entry of the Decree. However, the unfairness issue has been raised by companies who also generated and/or caused to be transported hazardous waste to the Seymour Site, but who are not included within the group of 24 companies who are a party to the Consent Decree. These objecting companies argued to this Court that the 24 companies who are parties to the Consent Decree and who shipped approximately 50% of the waste to the Site will be paying $7.7 million for the surface cleanup, while the remaining more than 300 companies who shipped the other 50% of the waste to the Site are being asked to pay in separate settlement negotiations with the United States, which are unrelated to this Consent Decree, the sum of $15 million for ground water cleanup at the Site. The Court has considered carefully and in detail the arguments being advanced by these objectors. It has decided, however, to reject these arguments on the basis of the evidence presented to the Court and arguments by counsel for the United States and for one of the 24 companies.

These facts show that the United States, mindful of its responsibility to clean up the Seymour Site in an expeditious manner in the public interest, decided to split the task into two separate parts, each of which the United States estimates comprises approximately one-half of the work required to achieve a total cleanup of the Site. The first of these parts is the cleanup of the surface at the Site. The evidence presented demonstrated that this surface cleanup must necessarily proceed before any subsurface or ground water cleanup because only when the barrels have been removed from the Site will it be possible to clean-up the subsurface. Moreover, the evidence showed that the continued presence of leaking barrels of waste on the surface will exacerbate any groundwater contamination.

The group of 24 companies came to the United States with a proposal by which they would arrange with a contractor to perform the surface cleanup in accordance with specifications agreed to by the companies, the United States and the State, regardless of the cost of that work and regardless of cost overruns. Specifically, the Consent Decree provides a $7.7 million cash fund plus a $15 million completion bond for a total cash fund of $22.5 million to pay for completion of the work described in Exhibit B to the Consent Decree. In addition the United States may look to the contractor's assets to require completion of the work, and the contractor is obligated by the terms of the Decree to complete the surface cleanup set forth in Exhibit B to the Decree regardless of its ultimate cost.

At the same time, the United States has set in motion, through negotiation, a procedure by which each of those companies who sent waste to the Site, but are not parties to the Consent Decree may pay a fixed sum of money, based upon the volume of material which they sent to the Site, and thereby obtain a covenant not to sue by the United States. This is a "cash out" proposal which does not require these parties to arrange for the performance of any work. While in total the sum being asked from those who are not a party to the Consent Decree is greater than the sum being paid by the 24 who are parties to the Decree, this does not render the government's approach unfair to any parties. Those who are parties to the Consent Decree took upon themselves the obligation to hire the contractor and to develop a work proposal by which the surface cleanup is to be completed without active management (but with monitoring) by the United States and without respect to cost. Those companies who are not parties to the Decree have a number of choices. They may accept the government's offer for a cash settlement in return for a covenant not to sue; they may try to form a group of their own to deal with the ground water cleanup in a manner comparable to that dealt with by the 24 companies with respect to the surface; or they may choose to litigate with the United States in which case they may end up with a smaller payment on a proportional basis than those who are in the group of 24.

One of the factors that the Court found persuasive on this issue of unfairness is that by the time of the November 30 hearing approximately 140 companies of those not part of the group of 24 decided to accept the government's "cash out" offer. Their total sum of payment will be in excess of $3 million. To the Court, the large number of acceptances of the government's "cash out" offer indicates that this offer was not unfair and that the government was dealing fairly with those who were not parties to the Consent Decree.

There is a public interest in encouraging parties to come forward first in an effort to settle enforcement cases. This is consistent with the general policy favoring the compromise of claims.

Finally, with respect to the fairness issue, no evidence, such as sworn testimony (as opposed to written statements or arguments of counsel) was ever presented to the Court on this issue by the objectors. Based upon the record before the Court as a whole, the Court finds that the United States has not dealt unfairly with those companies who are not parties to the Consent Decree.

(3) Reasonableness.

In considering the reasonableness of the consent decree, the Court has considered five factors: 1) the nature and extent of the potential hazards at the site; 2) the availability and likelihood of alternatives to the Consent Decree which would result in cleanup of the surface of the site; 3) the adequacy of the technical proposal of the work which will be undertaken; 4) the extent to which the Consent Decree furthers the goals of the statutes which form the basis for this litigation; 5) the extent to which the Court's approval of the Consent Decree is in the public interest.

At the hearing on the Consent Decree, the United States presented the testimony of Beverly Kush, employed as on-scene coordinator for the Seymour site by the United States Environmental Protection Agency, James Hunt, Division of Land Pollution Control of the Board of Health of the State of Indiana, David Lamb, Director of the Division of Land Pollution Control of the Board of Health of the State of Indiana and Raymond W. Bock, Director of Sales and project supervisor for Chemical Waste Management, Inc. which will perform the actual cleanup work at the Seymour site. No other evidence was presented by any other party or participant in the hearing. No one chose to cross-examine the government's witnesses.

The unrebutted testimony of Kush, Hunt and Bock established that there are approximately 60,000 barrels of hazardous chemicals, numerous bulk storage tanks and laboratory chemicals present at the Seymour site. Although fenced, the site is relatively unsecure and is susceptible of vandalism or easy entry. The site is located within one-half mile of a residential area which depends on wells for drinking water. The runoff of rainwater from the site flows into a drainage ditch which leads off the site and ultimately connects with the East Fork of the White River. Beverly Kush testified that the flow of underground water in the aquifer beneath the site is away from the site towards the residential drinking water wells and the White River.

Through the testimony of Hunt, Bock and Kush the government established that the drums on the site were in an extremely deteriorated condition. The witnesses estimated that between

35-75% of all drums on site were corroded and rusting and were leaking materials into the ground. Government's exhibits 1-27 (a video-tape and twenty-six slide photographs of the site) graphically depicted the dilapidated condition of the barrels on the site. Through the testimony of Hunt and Bock the government showed that the conditions of the barrels had significantly deteriorated during each of the past two years. Kush and Hunt testified that, in their opinions, the site presented an immediate, substantial endangerment to public health and the environment and that fire, explosion and ground water contamination were possible hazards which the conditions at the site could cause.

In the opinion of Kush, Hunt and Bock it is essential that the surface cleanup of the site begin as expeditiously as possible. Bock testified that delaying the beginning of the project until the on-set of winter would make timely completion substantially more difficult if not impossible. He further testified that if frozen ground conditions occurred before the initial site preparation (such as road grading and construction of barrel crushing facilities) was completed, the cleanup activities would in all likelihood not be able to begin until Spring of 1983. Hunt, Kush and Bock all testified that many of the barrels might not withstand another winter at the site and that the condition of the barrels was continuing to deteriorate and would do so if allowed to remain on site.

The Court is persuaded that clean-up of the surface of the site must start as soon as possible to protect against the potential hazards testified to by Kush, Hunt and Bock. The court is very concerned that delay in clean-up will exacerbate the potential for groundwater contamination from the leakage and spillage of chemicals and other substances onto the surface of the site. The government's evidence showed that chemicals and substances which are spilled on the ground at the site may and are getting into groundwater under the site. The Court believes that a prompt cleanup of the surface coupled with analysis of the potential groundwater contamination is essential to the protection of public health and the environment. Kush and Hunt testified that both the federal and state governments place high priority on the determination of the existence and scope of groundwater contamination and the undertaking of the appropriate remedy for it. Both testified that completion of groundwater studies and implementation of a groundwater remedy cannot take place until the surface cleanup is completed. Accordingly, the Court finds the hazardous conditions at the site require an expeditious cleanup of the surface of the Seymour site.

Through the testimony of David Lamb from the Board of Health of the State of Indiana the government established that the State of Indiana lacks any fund with which to match federal expenditures at the site which could come from the Hazardous Response Trust Fund (of "Superfund"). Matching funds are required under Section 104(c)(3) of the Statute, 42 U.S.C. 6904(c)(3). Mr. Lamb testified that the earliest time the State could realistically expect to provide as much as $1 million in matching funds would be the summer or fall of 1983. Matching funds in the amount of $3.5 million would, in Mr. Lamb's opinion, be available no sooner than the summer of 1984. Ms. Kush from EPA testified that no Superfund monies were available to undertake the surface clean-up. Thus, it appears to the Court that the expenditure of funds under authority of Superfund is not a viable alternative to the Consent Decree as a method of insuring expeditious cleanup of the surface of the site.

The Court judicially notices, and it is the unrebutted testimony of Kush and Hunt, that prior to the clean-up plan embodied in the Consent Decree, no plan insuring full cleanup of the surface had been forthcoming from any party to the litigation or any other persons, other than a temporary, emergency action by EPA. No objecting party could assure the Court that the surface cleanup could promptly be accomplished through any other mechanism than the Consent Decree. Government counsel represented to the Court that previous negotiations for cleanup had proved unfruitful. The oral and written representations of counsel for both objecting parties and counsel for one of the defendants which are parties to the decree confirm the past failure of negotiations.

No party disputes the technical adequacy of the plan for surface cleanup. The testimony offered by the government from

Kush, Hunt and Bock convinces the Court that the plan submitted to the Court is acceptable to the state and federal agencies charged in the first instance with assuring that the proposal is adequate to protect public health and the environment. The Court has satisfied itself through expert testimony that the plan is adequate to accomplish the surface cleanup of the site consistent with the protection of public health and the environment which are the goals of the Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response Compensation Liability Act and the Clean Water Act.

In addition, the Court has determined that the approach taken here by the United States with respect to hazardous waste cases generally is reasonable from the standpoint of the long-range public interest. It is desirable to settle such cases, without the necessity for litigation.

In considering the reasonableness of the approach taken by the government, the Court has inquired of counsel as to how the group of 24 was developed. The Court is satisfied that the approach taken by the government in negotiating with this group was a reasonable one, having in mind the statutory goals of Superfund. Counsel has represented to the Court the following: As a part of the surface cleanup the 24 companies have created a Trust Fund utilizing a Trust Agreement as their legal mechanism and that IBM, General Motors, Cummins Engine and Merchants National Bank & Trust Company of Indianapolis will be the Trustees. The purpose of this Trust Agreement is to provide for the creation of the Fund which will make payments .o Chemical Waste Management to perform the work described in Exhibit B to the Consent Decree. In this regard, the Trust Fund has an agreement with Chemical Waste Management to perform the work described in Exhibit B. This agreement contains a schedule for payments to Chemical Waste Management, and it establishes rights and responsibilities as between Chemical Waste Management and the Trust Fund. The purpose of both of these agreements is to create a funding mechanism to insure prompt completion of the work. Neither the United States nor the State is a party to either of these two agreements. There is a further agreement being negotiated between the United States and the City of Seymour and the Seymour Aviation Board ertaining to the covenant not to sue being given to those companies who are not a party to this group of 24. Counsel has represented to the Court that the United States has no other agreements with the 24 consenting companies listed in Exhibit A to the Consent Decree concerning the cleanup of the Seymour Site.

Under the standards enunciated above, the Court finds that the government's action in entering into this decree is reasonable and is in the public interest. In reaching this determination, the Court has particularly considered the need to abate the hazardous conditions at the site as expeditiously as possible and the unavailability of any other prompt plan to ndertake the cleanup.

In its review of the Consent Decree, as originally filed with the Court, the Court observed that the Decree provided that the 24 companies were required to preserve records and documents relating relating to Seymour Recycling Corporation only for a six month period after the effective date of the Decree. In response to a proposal by the Court, the companies agreed to modify that provision (which is in Paragraph XI of the Decree) to require that the companies will each preserve "pending further Court order" records and documents relating to Seymour Recycling Corporation. By this modification of the Decree, the Court has insured the availability of documents and records should a discovery request be made for them in the ongoing litigation with those who are not a party to the Consent Decree. Of course any party to whom a request for the production of documents is made may assert any claims which he has under the Federal Rules of Civil Procedure.

In summary, for the foregoing reasons, the Court believes that the Consent Decree (as modified in Paragraph XI), is in accordance with the public interest. It satisfies the requirements of legality, fairness and reasonableness. Accordingly, the Court has this date signed and entered the Consent Decree.

Dated this 15th day of December, 1982.

William E. Steckler
UNITED STATES DISTRICT JUDGE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

REC'D JAN 3 1983
Subcommittee on Investigations
and Oversight
Committee on Public Works
and Transportation

DEC 22 1982

Honorable Elliott H. Levitas
Chairman, Subcommittee on Investigations
  and Oversight
Committee on Public Works and Transportation
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Because of recent developments in the Seymour case, I take the opportunity once again, to communicate with you concerning your publicly expressed allegations that EPA is negotiating "sweetheart deals" with "major companies [who] are not being held liable for cleanup of hazardous waste sites." In this regard, the recently issued court opinion concerning the Seymour Consent Decree will be of interest to you.

On December 15, 1982, the date of my recent letter to you, Judge William E. Steckler of the U.S. District Court for the Southern District of Indiana issued a Memorandum of Law in which he formally approved and entered the Consent Decree embodying the terms of the negotiated settlement of $7.7 million for the Seymour Recycling Corp. facility providing for full surface cleanup of hazardous wastes. A copy of this Memorandum is enclosed for your information.

The court concluded that the Consent Decree should be approved and entered because it is in the public interest and meets all requirements of the judicial tests of legality, fairness and reasonableness. In particular, the court noted that the surface cleanup required by the Consent Decree is an important element of the overall Seymour site cleanup effort which is clearly in the public interest, and particularly in the interest of citizens affected by the site.

With respect to legality, the court stated that the Consent Decree has not violated any law, and in fact, furthers compliance with the statutes under which the action was brought, in particular, Superfund.

Specifically addressing your concerns for "sweetheart deals" the court examined very carefully, the factual background of the negotiated settlement with the 24 parties executing the Seymour Consent Decree. Considered together with the separate pro-rata settlement with 171 responsible parties identified with the Seymour site, announced by EPA on December 14, 1982, and the objections of non-settling parties to the Consent Decree, the court concluded that the United States has not dealt unfairly with the companies who were not parties to the Consent Decree.

Finally, the court discussed at some length the issue of reasonableness of the Consent Decree and decided that the Government's action in entering into the Consent Decree was reasonable and in the public interest. This determination was made after considering the need to mitigate hazardous conditions at the Seymour site in an expeditious manner and the unavailability of any other prompt plans to undertake such cleanup.

I encourage you to read the Court's Memorandum as it addresses the concerns expressed by you and other observers respecting the Government's approach to settlement in the Superfund program. I believe the Court's Memorandum supports and sanctions this Agency's approach to voluntary settlement from verified responsible parties through negotiations. As I stated to you in my previous letter, EPA's recent successes in achieving voluntary response for control of hazardous waste sites demonstrates that this approach is a valid and productive means to address a national environmental problem of considerable magnitude and complexity.

Sincerely yours,

Rita M. Lavelle

Rita M. Lavelle
Assistant Administrator

Enclosure

U.S. Department of Justice

United States Attorney
Southern District of Indiana

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317/269-6333
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December 15, 1982

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U.S. Environmental Protection Agency
Region V
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Chicago, Illinois 60604

Re: United States of America v. Seymour Recycling, et al.,
Cause No. 80-457-C

Lady and Gentlemen:

Please find enclosed copies of the memorandum opinion of the court. I am informed that the opinion will be sent to West, Dean William F. Harvey of the law school (who does some publishing regularly) and to Lexis.

Very truly yours,

SARAH EVANS BARKER
United States Attorney

Charles Goodloe J

By: Charles Goodloe, Jr.
Assistant United States Attorney

Enclosures

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA Plaintiff, v. SEYMOUR RECYCLING CORP., et al., Defendants.	)	Civil Action No. IP 80-457-C

MEMORANDUM

This matter comes before the Court for consideration of a proposed Consent Decree which the United States has lodged with the Court. The proposed Consent Decree provides for a surface cleanup of the approximately 60,000 barrels of toxic chemicals, bulk storage, and contaminated soil at the Seymour Recycling Site in Seymour, Indiana.

The United States filed the original complaint in this action on May 19, 1980, alleging violations of Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973 and Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321 against various parties including those who owned and operated the Seymour Recycling Site. Named defendants answered the complaint, and discovery proceeded.

On October 26, 1982, the United States filed with this Court an amended complaint adding additional allegations as to the original defendants under the Comprehensive Environmental Response, Compensation, and Liability Act (known as "CERCLA" or "Superfund"), 42 U.S.C. § 9606 and § 9607, enacted after the filing of the original complaint. In addition, the United States named in the amended complaint 24 new defendants, who are alleged to have "generated and caused to be transported solid and hazardous wastes and hazardous substances to the Seymour Site for handling, storage, treatment, or disposal." Motions to intervene were filed by the State of Indiana and the County of Jackson on October 26, 1982. On the same day the United States, the State of Indiana, the County of Jackson, Indiana, the City of Seymour, Indiana, the Board of Aviation Commissioners of Seymour, Indiana, and the 24 companies who were the new defendants added by the amended complaint filed a proposed Consent Decree with the Court.

This Consent Decree provides a mechanism by which the surface cleanup of the Seymour Recycling Site may promptly occur. The Decree provides that each of the 24 companies shall, within 15 days after the entry of the Decree, pay to the Seymour Site Trust Fund, established at a bank in Indianapolis, the sum for that company which is shown in Exhibit A to the

Decree.[1] The Trustees of the Fund shall use the money in the Trust Fund to pay Chemical Waste Management, a firm specializing in hazardous waste removal, to perform the surface cleanup at the Seymour Site. The precise scope of work to be done by Chemical Waste Management is set forth in detail in Exhibit B to the Consent Decree. The Decree also provides that Chemical Waste Management shall be responsible for the completion of the work regardless of its ultimate actual cost and that Chemical Waste Management shall purchase a performance bond in the amount of $15,000,000, which bond shall further assure completion of the work. The Decree specifies the obligations of Chemical Waste Management to purchase and to maintain in force insurance policies to protect the United States, the State and the public. It is contemplated that this project shall take approximately one year to complete. The Decree provides for continuing observation and monitoring of the progress of the work by the United States and the State as well as their approval of the satisfactory completion of the work.

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At the time of lodging, the Court set a hearing on the Consent Decree for November 10, 1982. On October 29, 1982, pursuant to its regulations published in 28 CFR 50.7, the United States Department of Justice published notice in the Federal Register, 47 Fed. Reg. 49107, of the lodging of the Consent Decree and invited public comment on it. The public comment period which is normally thirty (30) days was shortened to ten (10) days, pursuant to these regulations, because in the judgment of the Department of Justice there was a need to begin the surface cleanup expeditiously to abate a serious public health hazard because the advent of winter in the Seymour area could adversely affect the ability of the contractor to begin work at the Site.

In response to the Federal Register notice, comments were received from sixteen corporations. No comments were received from any individual citizens. On November 10, the United States filed with the Court copies of comments which it had received as well as its Response to those comments.

At the November 10 hearing, the United States explained the background to the Decree, and all interested persons, including those who were objecting to the entry of the Decree and were not a party in the action, were provided with an opportunity to participate in the hearing and to present their various positions to the Court. At this hearing, representatives of several objecting companies made statements to the Court. At the conclusion of the hearing the Court indicated, in response to objections that the comment period was too short, that the period for public comment would be extended to November 26, 1982, and that a further hearing would be scheduled by the Court for November 30. Several additional comments were received during this period. These were filed with the Court along with the Response of the United States to the Comments.

At the hearing on November 30, the Court once again permitted all interested persons, including those who were not parties in the action, to participate and to present any objections which they might have to the Decree. Again, several objectors made statements to the Court. There were no requests made for formal intervention, notwithstanding the government's statement that it would not oppose such intervention. Those participating in the hearing on November 30 included, in addition to the United States, representatives of the City of

Seymour and the Seymour Aviation Board, the State of Indiana, the Seymour Chamber of Commerce, the League of Women Voters of Seymour, representatives from companies within the group of 24, and representatives of companies opposing the decree. The United States presented sworn testimony from an official of Chemical Waste Management, from an official of the Environmental Protection Agency of the United States Government, and from two officials from the State of Indiana. An opportunity was provided for cross-examination of these witnesses. Finally, in addition to the materials submitted by the Department of Justice and the information presented at the hearings on November 10 and November 30, a number of comments about the Consent Decree were submitted directly to the Court. The United States filed its Supplemental Response to Comments as it is required to do so by its regulations. See 28 C.F.R. 50.7. After consideration of the comments, the United States continues to advocate the entry of the proposed Decree and gives its consent to the entry of the Decree.

The Court has concluded, based upon a careful review and consideration of all the information presented to it, that the Court should approve the Consent Decree. The surface cleanup authorized by this Decree is a very valuable and important part of the overall cleanup of the Seymour Site, which is in the public interest and particularly in the interest of those citizens affected by the Site. The Court is persuaded that time is of the essence in commencing this cleanup before the onset of winter. Accordingly, this cleanup should proceed as promptly as possible without any further delay.

In deciding whether to approve a proposed decree, a court must inquire whether the decree is consistent both with the Constitution and with the mandate of Congress. See United States v. Kitchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alaska 1977); United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). Second, the court "must assure itself that the terms of the decree are fair and adequate." See United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. at 1072. Finally, the court must inquire whether the settlement is a reasonable one. See In re Corrugated Container Antitrust Litigation, 659 F.2d 1322, 1325 (5th Cir. 1981), cert. denied, 102 S.Ct. 2283 (1982), cert. denied, 102 S.Ct. 2308 (1982). The underlying purpose of the court in making these inquiries is to determine whether the decree adequately protects the public interest. United States v. Ketchikan Pulp Co., supra, 430 F. Supp. at 86. The court "must eschew any rubber stamp approval in favor of an independent evaluation," United States v. Hooker Chemicals and Plastics Corp., supra, 540 F. Supp. at 1072, but because of the clear public policy favoring settlements the court must not substitute its judgment for that of the parties. See Airline Stewards v. American Airlines, 573 F.2d 960, 963 (7th Cir. cert. denied, 439 U.S. 876 (1978).

(1) Legality. With regard to the factors of legality and constitutionality, no objection has been raised to the entry of the Decree. Those statutes under which the amended complaint has been filed empower the United States to bring enforcement actions. See 42 U.S.C. § 9606, 42 U.S.C. § 6928, 42 U.S.C. § 1321(e). Furthermore, the authority of the United States and the Attorney General to compromise during litigation is well established. See United States v. Hooker Chemicals and Plastics Corp., supra, United States v. Kitchikan Pulp Co., supra. Here the Consent Decree is not violative of any law; indeed, it furthers compliance with the statutes under which the action was brought, most particularly with Superfund. In addition, all of the parties to the Decree have consented to the jurisdiction of the Court for the purposes of this Decree.

(2) Fairness. With respect to the rights and obligations of the parties consenting to the Decree, there is no objection as to fairness. All of these parties have urged its entry. This Court has, however, looked beyond the parties consenting thereto and considered the arguments raised by non-parties, both in comments filed with the Department of Justice and in arguments presented to this Court that the entry of the Decree is unfair to them. However, no objecting party requested an opportunity to intervene in this action to offer any evidence of alleged unfairness nor asked to cross-examine any witness.

No citizen of Seymour has objected to the entry of the Decree. However, the unfairness issue has been raised by companies who also generated and/or caused to be transported hazardous waste to the Seymour Site, but who are not included within the group of 24 companies who are a party to the Consent Decree. These objecting companies argued to this Court that the 24 companies who are parties to the Consent Decree and who shipped approximately 50% of the waste to the Site will be paying $7.7 million for the surface cleanup, while the remaining more than 300 companies who shipped the other 50% of the waste to the Site are being asked to pay in separate settlement negotiations with the United States, which are unrelated to this Consent Decree, the sum of $15 million for ground water cleanup at the Site. The Court has considered carefully and in detail the arguments being advanced by these objectors. It has decided, however, to reject these arguments on the basis of the evidence presented to the Court and arguments by counsel for the United States and for one of the 24 companies.

These facts show that the United States, mindful of its responsibility to clean up the Seymour Site in an expeditious manner in the public interest, decided to split the task into two separate parts, each of which the United States estimates comprises approximately one-half of the work required to achieve a total cleanup of the Site. The first of these parts is the cleanup of the surface at the Site. The evidence presented demonstrated that this surface cleanup must necessarily proceed before any subsurface or ground water cleanup because only when the barrels have been removed from the Site will it be possible to clean-up the subsurface. Moreover, the evidence showed that the continued presence of leaking barrels of waste on the surface will exacerbate any groundwater contamination.

The group of 24 companies came to the United States with a proposal by which they would arrange with a contractor to perform the surface cleanup in accordance with specifications agreed to by the companies, the United States and the State, regardless of the cost of that work and regardless of cost overruns. Specifically, the Consent Decree provides a $7.7 million cash fund plus a $15 million completion bond for a total cash fund of $22.5 million to pay for completion of the work described in Exhibit B to the Consent Decree. In addition the United States may look to the contractor's assets to require completion of the work, and the contractor is obligated by the terms of the Decree to complete the surface cleanup set forth in Exhibit B to the Decree regardless of its ultimate cost.

At the same time, the United States has set in motion, through negotiation, a procedure by which each of those companies who sent waste to the Site, but are not parties to the Consent Decree may pay a fixed sum of money, based upon the volume of material which they sent to the Site, and thereby obtain a covenant not to sue by the United States. This is a "cash out" proposal which does not require these parties to arrange for the performance of any work. While in total the sum being asked from those who are not a party to the Consent Decree is greater than the sum being paid by the 24 who are parties to the Decree, this does not render the government's approach unfair to any parties. Those who are parties to the Consent Decree took upon themselves the obligation to hire the contractor and to develop a work proposal by which the surface cleanup is to be completed without active management (but with monitoring) by the United States and without respect to cost. Those companies who are not parties to the Decree have a number of choices. They may accept the government's offer for a cash settlement in return for a covenant not to sue; they may try to form a group of their own to deal with the ground water cleanup in a manner comparable to that dealt with by the 24 companies with respect to the surface; or they may choose to litigate with the United States in which case they may end up with a smaller payment on a proportional basis than those who are in the group of 24.

One of the factors that the Court found persuasive on this issue of unfairness is that by the time of the November 30 hearing approximately 140 companies of those not part of the group of 24 decided to accept the government's "cash out" offer. Their total sum of payment will be in excess of $3 million. To the Court, the large number of acceptances of the government's "cash out" offer indicates that this offer was not unfair and that the government was dealing fairly with those who were not parties to the Consent Decree.

There is a public interest in encouraging parties to come forward first in an effort to settle enforcement cases. This is consistent with the general policy favoring the compromise of claims.

Finally, with respect to the fairness issue, no evidence, such as sworn testimony (as opposed to written statements or arguments of counsel) was ever presented to the Court on this issue by the objectors. Based upon the record before the Court as a whole, the Court finds that the United States has not dealt unfairly with those companies who are not parties to the Consent Decree.

(3) Reasonableness.

In considering the reasonableness of the consent decree, the Court has considered five factors: 1) the nature and extent of the potential hazards at the site; 2) the availability and likelihood of alternatives to the Consent Decree which would result in cleanup of the surface of the site; 3) the adequacy of the technical proposal of the work which will be undertaken; 4) the extent to which the Consent Decree furthers the goals of the statutes which form the basis for this litigation; 5) the extent to which the Court's approval of the Consent Decree is in the public interest.

At the hearing on the Consent Decree, the United States presented the testimony of Beverly Kush, employed as on-scene coordinator for the Seymour site by the United States Environmental Protection Agency, James Hunt, Division of Land Pollution Control of the Board of Health of the State of Indiana, David Lamb, Director of the Division of Land Pollution Control of the Board of Health of the State of Indiana and Raymond W. Bock, Director of Sales and project supervisor for Chemical Waste Management, Inc. which will perform the actual cleanup work at the Seymour site. No other evidence was presented by any other party or participant in the hearing. No one chose to cross-examine the government's witnesses.

The unrebutted testimony of Kush, Hunt and Bock established that there are approximately 60,000 barrels of hazardous chemicals, numerous bulk storage tanks and laboratory chemicals present at the Seymour site. Although fenced, the site is relatively unsecure and is susceptible of vandalism or easy entry. The site is located within one-half mile of a residential area which depends on wells for drinking water. The runoff of rainwater from the site flows into a drainage ditch which leads off the site and ultimately connects with the East Fork of the White River. Beverly Kush testified that the flow of underground water in the aquifer beneath the site is away from the site towards the residential drinking water wells and the White River.

Through the testimony of Hunt, Bock and Kush the government established that the drums on the site were in an extremely deteriorated condition. The witnesses estimated that between

35-75% of all drums on site were corroded and rusting and were leaking materials into the ground. Government's exhibits 1-27 (a video-tape and twenty-six slide photographs of the site) graphically depicted the dilapidated condition of the barrels on the site. Through the testimony of Hunt and Bock the government showed that the conditions of the barrels had significantly deteriorated during each of the past two years. Kush and Hunt testified that, in their opinions, the site presented an immediate, substantial endangerment to public health and the environment and that fire, explosion and ground water contamination were possible hazards which the conditions at the site could cause.

In the opinion of Kush, Hunt and Bock it is essential that the surface cleanup of the site begin as expeditiously as possible. Bock testified that delaying the beginning of the project until the on-set of winter would make timely completion substantially more difficult if not impossible. He further testified that if frozen ground conditions occurred before the initial site preparation (such as road grading and construction of barrel crushing facilities) was completed, the cleanup activities would in all likelihood not be able to begin until Spring of 1983. Hunt, Kush and Bock all testified that many of the barrels might not withstand another winter at the site and that the condition of the barrels was continuing to deteriorate and would do so if allowed to remain on site.

The Court is persuaded that clean-up of the surface of the site must start as soon as possible to protect against the potential hazards testified to by Kush, Hunt and Bock. The court is very concerned that delay in clean-up will exacerbate the potential for groundwater contamination from the leakage and spillage of chemicals and other substances onto the surface of the site. The government's evidence showed that chemicals and substances which are spilled on the ground at the site may and are getting into groundwater under the site. The Court believes that a prompt cleanup of the surface coupled with analysis of the potential groundwater contamination is essential to the protection of public health and the environment. Kush and Hunt testified that both the federal and state governments place high priority on the determination of the existence and scope of groundwater contamination and the undertaking of the appropriate remedy for it. Both testified that completion of groundwater studies and implementation of a groundwater remedy cannot take place until the surface cleanup is completed. Accordingly, the Court finds the hazardous conditions at the site require an expeditious cleanup of the surface of the Seymour site.

Through the testimony of David Lamb from the Board of Health of the State of Indiana the government established that the State of Indiana lacks any fund with which to match federal expenditures at the site which could come from the Hazardous Response Trust Fund (of "Superfund"). Matching funds are required under Section 104(c)(3) of the Statute, 42 U.S.C. 6904(c)(3). Mr. Lamb testified that the earliest time the State could realistically expect to provide as much as $1 million in matching funds would be the summer or fall of 1983. Matching funds in the amount of $3.5 million would, in Mr. Lamb's opinion, be available no sooner than the summer of 1984. Ms. Kush from EPA testified that no Superfund monies were available to undertake the surface clean-up. Thus, it appears to the Court that the expenditure of funds under authority of Superfund is not a viable alternative to the Consent Decree as a method of insuring expeditious cleanup of the surface of the site.

The Court judicially notices, and it is the unrebutted testimony of Kush and Hunt, that prior to the clean-up plan embodied in the Consent Decree, no plan insuring full cleanup of the surface had been forthcoming from any party to the litigation or any other persons, other than a temporary, emergency action by EPA. No objecting party could assure the Court that the surface cleanup could promptly be accomplished through any other mechanism than the Consent Decree. Government counsel represented to the Court that previous negotiations for cleanup had proved unfruitful. The oral and written representations of counsel for both objecting parties and counsel for one of the defendants which are parties to the decree confirm the past failure of negotiations.

No party disputes the technical adequacy of the plan for surface cleanup. The testimony offered by the government from

Kush, Hunt and Bock convinces the Court that the plan submitted to the Court is acceptable to the state and federal agencies charged in the first instance with assuring that the proposal is adequate to protect public health and the environment. The Court has satisfied itself through expert testimony that the plan is adequate to accomplish the surface cleanup of the site consistent with the protection of public health and the environment which are the goals of the Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response Compensation Liability Act and the Clean Water Act.

In addition, the Court has determined that the approach taken here by the United States with respect to hazardous waste cases generally is reasonable from the standpoint of the long-range public interest. It is desirable to settle such cases, without the necessity for litigation.

In considering the reasonableness of the approach taken by the government, the Court has inquired of counsel as to how the group of 24 was developed. The Court is satisfied that the approach taken by the government in negotiating with this group was a reasonable one, having in mind the statutory goals of Superfund. Counsel has represented to the Court the following: As a part of the surface cleanup the 24 companies have created a Trust Fund utilizing a Trust Agreement as their legal mechanism and that IBM, General Motors, Cummins Engine and Merchants National Bank & Trust Company of Indianapolis will be the Trustees. The purpose of this Trust Agreement is to provide for the creation of the Fund which will make payments to Chemical Waste Management to perform the work described in Exhibit B to the Consent Decree. In this regard, the Trust Fund has an agreement with Chemical Waste Management to perform the work described in Exhibit B. This agreement contains a schedule for payments to Chemical Waste Management, and it establishes rights and responsibilities as between Chemical Waste Management and the Trust Fund. The purpose of both of these agreements is to create a funding mechanism to insure prompt completion of the work. Neither the United States nor the State is a party to either of these two agreements. There is a further agreement being negotiated between the United States and the City of Seymour and the Seymour Aviation Board pertaining to the covenant not to sue being given to those companies who are not a party to this group of 24. Counsel has represented to the Court that the United States has no other agreements with the 24 consenting companies listed in Exhibit A to the Consent Decree concerning the cleanup of the Seymour Site.

Under the standards enunciated above, the Court finds that the government's action in entering into this decree is reasonable and is in the public interest. In reaching this determination, the Court has particularly considered the need to abate the hazardous conditions at the site as expeditiously as possible and the unavailability of any other prompt plan to undertake the cleanup.

In its review of the Consent Decree, as originally filed with the Court, the Court observed that the Decree provided that the 24 companies ~~were~~ required to preserve records and documents relating relating to Seymour Recycling Corporation only for a six month period after the effective date of the Decree. In response to a proposal by the Court, the companies agreed to modify that provision (which is in Paragraph XI of the Decree) to require that the companies will each preserve "pending further Court order" records and documents relating to Seymour Recycling Corporation. By this modification of the Decree, the Court has insured the availability of documents and records should a discovery request be made for them in the ongoing litigation with those who are not a party to the Consent Decree. Of course any party to whom a request for the production of documents is made may assert any claims which he has under the Federal Rules of Civil Procedure.

In summary, for the foregoing reasons, the Court believes that the Consent Decree (as modified in Paragraph XI), is in accordance with the public interest. It satisfies the requirements of legality, fairness and reasonableness. Accordingly, the Court has this date signed and entered the Consent Decree.

Dated this 15th day of December, 1982.

William E. Steckler
UNITED STATES DISTRICT JUDGE

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FURTHER INFORMATION ON CONTEMPT CITATION OF ADMINISTRATION OF EPA

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Georgia (Mr. Levitas) is recognized for 10 minutes.

● Mr. LEVITAS. Mr. Speaker, in an effort to keep the Members of this House informed about the proceedings of the contempt citation of the Administrator of the Environmental Protection Agency, I am inserting for the Record a copy of a letter with enclosures, that I sent on December 29, 1982, to the Honorable Peter W. Rodino, Jr., chairman of the House Judiciary Committee:

House of Representatives,
Washington, D.C., December 29, 1982.

Hon. Peter W. Rodino, Jr.,
Chairman, House Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: In furtherance of our conversations about the contempt citation of the Administrator of the Environmental Protection Agency (H. Res. 632) and the response of the Attorney General, I am enclosing a copy of a statement I made on the floor of the House on December 20.

Subsequently, I received a copy of the enclosed letter, dated December 27, 1982 from the United States Attorney for the District of Columbia addressed to The Speaker concerning the same matter.

In addition to the matter of possible impeachable offenses by the Attorney General and the U.S. Attorney, the question also arises whether a Special Prosecutor should be appointed to handle this case.

The U.S. Attorney's letter clearly spells out his conflict of interest. Furthermore, his conclusion that there is no requirement as to any time (e.g. timely manner) when he is required to present the case to the grand jury under Section 194 of Title 2 USC is obviously an abandonment of his statutory duties since under his interpretation he could take 5 or 10 or 20 years or more to get around to doing his duty. His statement that he recognizes "the likelihood" that he is in disagreement with the House "over the underlying merits of the controversy" further raises questions about his ability or willingness to discharge his statutory responsibilities.

The civil action to which the U.S. Attorney refers is frivilous to begin with, but beyond that, the suit has no preliminary injunctive relief prohibiting the U.S. Attorney or the House from proceeding under 2 USC 194. His startling decision that it would not be "appropriate" to bring the matter before the grand jury while the civil action is pending is simply joining in with the Attorney General's flaunting of the law and reflects a determination by both individuals not to take care that the law is faithfully executed.

Finally, I enclose for your consideration copy of a portion of the transcript of the hearing at which our Subcommittee cited the Administrator for contempt. The pertinent, sworn testimony is that of Assistant Attorney General Ted Olson, who stated, under oath, that the role of the Justice Department in advising the EPA Administrator would not inhibit the Justice Department from carrying out its responsibilities in prosecuting under the Congressional Contempt Statute . . . which is exactly what they have failed and refused to do.

Under the circumstances, I renew my request that your staff consider whether impeachable offenses may have been committed and also whether a Special Prosecutor should be appointed.

Very truly yours,

Elliott H. Levitas,
Member of Congress.

[From the Congressional Record, Dec. 20, 1982]

Recent Offensive Lawsuit Filed as United States Government Versus House of Representatives of the United States

Mr. Levitas. Mr. Speaker, I take this time to update the Members on the Gorsuch contempt of Congress matter that is now in process.

Subsequent to the action of the House last week in citing for contempt the Administrator of the Environmental Protection Agency, the Department of Justice filed lawsuit unprecedented in the history of this Nation entitled the United States of America versus the House of Representatives of the United States et al. which in and of itself is not only unprecedented, it is obviously offensive by its very name.

This Justice Department suit has been described by Lawrence Tribe, a professor of law at Harvard University, as totally without basis or merit. He accused the Justice Department officials who filed the case with "either abject ignorance of the Constitution or contemptible cynicism about constitutional separation of powers."

By instructing the U.S. attorney of the District of Columbia not to fulfill his duties to prosecute the contempt as required by the law, the Attorney General of the United States has failed to faithfully execute the law and is engaging, in my judgment, in an obstruction of justice.

I would hope that the Judiciary Committee will take action as promptly as possible to inquire into whether the actions of the U.S. attorney and the Attorney General of the United States constitute inpeachable offenses for failing to carry out and faithfully execute the law.

This is a very serious and grave matter raising the most fundamental constitutional questions, Mr. Speaker, and I think that when the highest law officer of this land fails to obey the law, it brings the entire system into discredit and into disrepute.

Accordingly, I would hope that the Judiciary Committee would promptly look into this matter to determine what further action might be taken.

The truth is that what we really want is the information from EPA to proceed with our oversight investigation of the Superfund program to clean up the hundreds of dangerous abandoned hazardous waste dumps. This investigation is our constitutional duty. It affects the health of the American people.

We do not want subpenas. We do not want contempt citations. We do not want impeachment proceedings. We do not want confrontation. We only want the facts so that we can do our job.

However, the administration seems to want a fight. They have failed to cooperate; failed to respond to a subpena; and now are failing to faithfully execute the law. That is our only way to get the facts, we must go forward.

U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEY, DISTRICT OF COLUMBIA,
Washington, D.C., December 27, 1982.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker, U.S. House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER. This is in response to your communication of December 17, 1982, certifying to me House Resolution 632 regarding the production of documents by The Honorable Anne M. Gorsuch, Administrator of the United States Environmental Protection Agency.

On December 16, 1982, Civil Action Number 82-3583 was filed by the Department of Justice in the United States District Court for the District of Columbia. In that case, the Department seeks to have the District Court declare that the compelled production of the documents sought by the House of Representatives unconstitutionally would contravene important separation of powers principles, and that the subpoena issued for those documents is constitutionally defective. Pursuant to Section 547 of Title 28, United States Code, I am responsible within this district for prosecuting, for the Government, all civil actions, suits, or proceedings in which the United States is concerned. Accordingly, although the principal work in the pending case is being done by the Civil Division of the Department of Justice, I nonetheless am in the posture of being legally responsible for the prosecution of that civil action for the Government.

Under the same statutory section, I also am responsible for prosecuting, within this district, all offenses against the United States. As part of the discreation which I must exercise as the chief prosecuting officer of this district, a determination must be made as to when a matter should be submitted to a grand jury.

I am keenly aware of the provisions of Section 194 of Title 2, United States Code. It should be noted that that section of the Code quite properly does not include a mandate as to the timing of submitting a matter to a grand jury.

I recognize the degree of interest which you and your colleagues have in this proceeding. Accordingly, as a matter of courtesy I wish to advise you that I have concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved. While I recognize the likelihood that we are in disagreement over the underlying merits of the controversy, we do have a common interest—namely, achieving a resolution of the disputed questions as expeditiously as possible and with a minimum of adverse consequences to good government and to the country as a whole. Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.

You may be assured of my continuing and careful attention to this matter.

Respectfully,

STANLEY S. HARRIS,
U.S. Attorney,
District of Columbia.

Mr. LEVITAS. Also, I want to direct this to the representative from the Justice Department, Mr. Olson.

Mr. OLSON. Yes, Mr. Chairman.

Mr. LEVITAS. Since I am going to ask you a question, I am required that I administer the oath to you for your response, if you would.

[Witness sworn.]

Mr. LEVITAS. Thank you, Mr. Olson.

Let me just ask you this question again. It is preliminary in nature. I don't want to get down the line and see if there is any problem. As you are aware, these proceedings may, as a matter of law, hopefully not but may lead to prosecution under the congressional intent statute. I am trying to inquire whether it is the Department of Justice's position that you may furnish information to Mrs. Gorsuch notwithstanding the fact that later prosecution for contempt may result from these proceedings and that furnishing such representation will neither inhibit nor prevent the department from carrying out its statutory responsibilities.

Mr. OLSON. This is not the appropriate time for the Attorney General or Department of Justice to make a determination as to who might represent an individual in a particular case or what particular case may be prosecuted under circumstances that have not yet developed, Mr. Chairman.

Mr. LEVITAS. Therefore, it is your position, as I understand it, that the fact that you have advised Mrs. Gorsuch, as I understand it, concerning this matter and the Attorney General has, and your participation in these proceedings today, would not prevent the Justice Department from discharging its statutory responsibilities under the congressional contempt statute if that should, which we hope it will not, eventuate?

Mr. OLSON. We do not believe that anything we have done to date or intend to do at this hearing would jeopardize the ability of the Attorney General to discharge his responsibilities under the Constitution and laws of the United States.●

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

THE HOUSE OF REPRESENTATIVES OF
THE UNITED STATES, et al.,

Defendants.

Civil Action No.
82-3583

DECLARATION OF ROBERT M. PERRY

I, Robert M. Perry, declare:

1. I am the Associate Administrator for Legal and Enforcement Counsel and the General Counsel of the United States Environmental Protection Agency ("EPA"). I have held this combined position since March of 1982.

2. The Office of Enforcement Counsel is within my supervisory responsibilities and is headed by Michael A. Brown, Enforcement Counsel. It has as its primary responsibility the conduct of enforcement litigation actions, both civil and criminal, against persons who violate environmental protection legislation and regulations.

3. One such environmental law is the Comprehensive Environmental Response, Compensation and Liability Act of 1980, P.L. 95-510, 94 Stat. 2767, December 11, 1980, codified at 42 U.S.C. §§9601, et seq. and commonly known as "The Superfund Act."

Administrative Enforcement Of The Superfund Act

4. The Superfund Act was designed to provide the federal government with the tools to abate the risks posed by hundreds of inactive and abandoned hazardous waste sites across the country. The Act provides two basic mechanisms by which the federal government may affect the cleanup of such sites. One mechanism allows the government to expend money from the $1.6 billion "Superfund," which is derived from congressional appropriations and taxes on crude oil, petroleum products and certain chemical products. See 42 U.S.C. § 9631. Once spent, the money may be recovered from parties made liable for the cleanup costs pursuant to Section 107 of the Act. See 42 U.S.C. § 9607. The second mechanism authorizes the President to require the Attorney General to institute judicial proceedings to "secure such relief as may be necessary to abate" an imminent and substantial endangerment to public health or welfare or the environment. See 42 U.S.C. § 9606. See generally United States v. Charles Price, 688 F.2d 204 (3rd Cir. 1982); United States v. Reilly Tar & Chemical Corporation, 546 F. Supp. 1100 (D. Minn. 1982).

5. On August 14, 1981, President Reagan issued Executive Order 12316, "Responses to Environmental Damage." By that order, the President delegated part of his authority to carry out the provisions to the Superfund Act to the Administrator of EPA. Pursuant to that delegation, EPA now has the authority to identify hazardous waste sites and to determine, among other things, the parties potentially responsible for the generation of the hazardous wastes located there. The Administrator of EPA may request

the Attorney General to institute judicial actions, but only the President may require him to do so. See 42 U.S.C. § 9606.

6. Both mechanisms are part of an overall law enforcement effort designed to protect the public health and welfare and the environment from the effects of the release or threatened release of hazardous substances which may present an imminent and substantial danger. 42 U.S.C. § 9604(a). In addition to the institution of judicial proceedings, the Act provides broad enforcement powers, authorizing the President or his delegate to issue administrative orders necessary to protect the public health and welfare or the environment and to require designated persons to furnish information about the storage, treatment, handling or disposal of hazardous substances. See 42 U.S.C. §§ 9606, 9604(e)(1). The Act also contains criminal penalties. 42 U.S.C. § 9603.

7. As with any new program, the implementation and enforcement of the Superfund Act has required the government to put into place the policies and personnel needed to carry out the statutory mandates. In the two years since the Superfund Act became law, EPA has pursued the implementation of this new statutory mandate with vigor. It has developed and published the National Contingency Plan required by Section 105 of the Act, 42 U.S.C. § 9605, which serves as the basis for Superfund-financed cleanups. See 47 Fed. Reg. 31180 (July 16, 1982). It has developed an Interim Priorities List identifying the 160 sites which pose the greatest risk to the public health and welfare and the environment. With assistance and input from the states, EPA has recently published

a proposed National Priorities List identifying the 418 sites which, in EPA's judgment, require priority in use of the Superfund to effect cleanup. See 47 Fed. Reg. 58476 (December 30, 1982).[*/] It has developed and published enforcement guidelines, as required by Section 106 of the Act, in consultation with the Attorney General. See 47 Fed. Reg. 20664 (May 13, 1982).

8. EPA has also pursued the enforcement of the Superfund Act vigorously. Since the passage of Superfund, EPA has sent more than 1,760 notice letters, undertaken Superfund-financed action at 112 sites involving the obligation of more than $236 million, filed Superfund claims in 25 judicial actions and obtained two criminal convictions. In its hazardous waste site efforts, the government has reached settlements in 33 civil actions calling for the expenditure of more than $121 million to conduct cleanup operations. In addition, the Agency and the Department are actively negotiating with responsible parties concerning the cleanup of 56 sites around the country. A recent judicial decision under the Superfund Act termed the government's approach in these cases "reasonable from the standpoint of the long-range public interest." United States v. Seymour Recycling Corporation, Civil Action No. IP-80-457-C, ___ F. Supp. ___, (S.D. Ind. Dec. 15, 1982), Slip. Op. (Attachment A to Plaintiffs' Points and Authorities) at 17.

[*/] The National Priorities List is required by Section 105(8)(B) of the Act, 42 U.S.C. § 9605(8)(B). Completion of the list must be preceded by notice and opportunity for public comment, 42 U.S.C. § 9605, para. 1, and may also be subject to legislative veto. 42 U.S.C. § 9655. The date for final promulgation of the National Priorities List has not yet been determined.

9. EPA's goal in the implementation of the Superfund Act is, of course, to effect cleanups which protect the public health and welfare and the environment as expeditiously as possible. Since the Superfund cannot pay for the cleanup of all sites and since enforcement litigation is complex and time-consuming, EPA has adopted an approach which seeks in the first instance to obtain cleanup from parties it has identified as responsible for or having contributed to the presence of hazardous substances at the sites. If voluntary cleanup cannot be achieved, the Agency then determines whether it will spend Superfund monies and sue for cost recovery under Section 107 or use its enforcement authority under Section 106 to obtain cleanup.

10. Before any meaningful contact with responsible parties can occur or administrative or judicial enforcement proceedings can be initiated, substantial time must be spent on investigation and case preparation. Of necessity, this is a time-consuming, resource-intensive process. It includes studying the nature and extent of the hazard present at sites, identifying potentially responsible parties and evaluating the evidence which exists or must be generated to support the government's action. This initial investigation is conducted by EPA attorneys and technical staff. Since many sites have literally hundreds of "generators" -- parties who produced or sent hazardous substances to the site -- the initial investigation of such a site typically will consume hundreds of hours and involve the examination of tens of thousands of documents.

11. Each continuing investigation is treated by EPA as an enforcement matter, since the government will, in almost every instance, proceed against responsible parties either for cost recovery or for injunctive relief. Moreover, even where voluntary settlements are obtained, EPA develops a strategy for conducting negotiations which is part of its overall enforcement effort. The staff which conduct the investigations are part of the Office of Enforcement Counsel and the Office of Solid Waste and Emergency Response, which are charged with the development and implementation of EPA's program in the hazardous waste area. At an early stage in the case development process, prior to the time EPA formally refers a case for the institution of judicial enforcement proceedings, a Department of Justice attorney is assigned to assist in the case evaluation and development process.

12. Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at the site unless they undertake an adequate program to clean up the site. Typically, following the issuance of notice letters, EPA enters into negotiations with responsible parties to reach an agreement which would require those parties to clean up the site. Such negotiations may involve hundreds of potentially responsible parties and millions of dollars in cleanup costs. Moreover, EPA may settle the case with some but not all parties and then have to continue negotiations as to the remaining parties.

13. Because the enforcement process can be lengthy and extremely complex, an enormous amount of paperwork is generated. This includes data on the amounts, nature, and origin of waste

present at a site; records of interaction with state and local government officials; records of the storage or disposal facility itself, as well as of the generators, treaters, transporters, and handlers of the substances which found their way to the site. It also includes correspondence with responsible parties, contractors, state officials, and representatives of other federal agencies, legal opinions and interpretation, internal memoranda on such matters as negotiation strategy, rights and remedies, case strengths and weaknesses and notes and logs from meetings, telephone conversations, and private deliberations.

The Subpoena

14. On March 10, 1982, the Subcommittee on Investigations and Oversight ("the Subcommittee") of the House Committee on Public Works and Transportation ("the Committee") opened hearings on certain environmental matters, including implementation of the Superfund Act.

15. On September 15, 1982, Chairman Elliott J. Levitas, on behalf of the Subcommittee, wrote a letter to the Administrator of the EPA, Mrs. Gorsuch, which letter stated in pertinent part:

> . . . this letter, in conformance with the provisions of section 104(e)(2)(D) of [the Superfund Act], is to request that all information being reported to or otherwise being obtained by [EPA] or any other acquiring such information on behalf of [EPA], be made available to the subcommittee.

Exhibit A hereto.

16. In response to the Subcommittee's concerns, EPA made available to the Subcommittee almost all documents from EPA's files on the 160 interim priority sites. Those documents, from open and closed Superfund enforcement cases, include data on the amounts, nature, and origin of wastes present at hazardous waste sites; correspondence between EPA and the generators of the hazardous waste; records of interraction with state and local government officials; correspondence with responsible parties, contractors, state officials and representatives of other federal agencies; notes and memoranda discussing the allocation of monies to particular sites by EPA; cooperative agreements arranged with the states involved; and notes and memoranda reflecting the process of having the Superfund Office begin working on a site while initiating settlement negotitions with the contractor. EPA declined, however, to make available to the Subcommittee certain sensitive law enforcement documents generated by government attorneys and other enforcement personnel in the development of potential litigation. Those documents, which are part of open law enforcement files, are memoranda, notes, correspondence and other written material discussing:

(a) the strengths and weakness of the government's case against potentially responsible parties;
(b) legal issues presented by cases;
(c) anticipated defenses to the government's claims;
(d) timetables and other enforcement plans;
(e) negotiation and litigation strategy; and
(f) the names of potential witnesses, their anticipated testimony and other evidentiary matters.

17. EPA's ability to conduct settlement negotiations with, or litigation against, responsible parties would be seriously hampered if sensitive law enforcement documents about such cases were prematurely released to them. EPA would, for example, be at an enormous disadvantage in attempting to negotiate an environmentally appropriate settlement agreement with a party who knew EPA's bottom-line settlement position, its negotiation strategy, and its perception of the strengths and weaknesses of the government's case. An enormous disadvantage would also be imposed if the government had to litigate cases against parties who were aware of the government's litigation strategy, its evidence, its plans and its perceptions of the strengths and weaknesses of its case.

18. Premature disclosure of sensitive enforcement documents might also have an adverse effect upon the reputation of persons whom EPA has preliminarily determined to be potentially responsible parties.

19. After EPA made its decision not to make sensitive law enforcement documents available to the Subcommittee, there were a number of meetings, letters and telephone conversations between the Subcommittee on the one hand and EPA and the Department of Justice on the other in an effort to work out an accommodation with respect to those documents. EPA sought to accommodate the Subcommittee's concerns about the withheld documents in a manner which would satisfy the need to prevent their premature disclosure. The Subcommittee attempted to assure EPA that, if EPA produced the documents to the Subcommittee, an effort would be made to maintain their confidentiality. However, such documents, if produced, could be disclosed to other members of Congress

and that Congress could decide to make the documents public even if EPA objected. See my letter of October 7, 1982 to Chairman Levitas, Exhibit B hereto; Transcript of Subcommittee Hearing, December 2, 1982, at 14-15;*/ Exhibit E at 7.

20. On November 16, 1982, the Subcommittee issued, and on November 22, 1982, the Subcommittee served on Mrs. Gorsuch a subpoena ("the Subpoena") calling for her to appear before the Subcommittee on December 2, 1982 and to produce at that time the following described documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of [the Superfund Act].

Exhibit D hereto.

21. Even though EPA had not promulgated the above-mentioned statutory list of national priority sites, EPA undertook to meet the Subcommittee's apparent concerns by beginning to gather all documents pertinent to EPA's Interim Priorities List of 160 sites. Some of those 160 cases were at that time in litigation and others were in earlier stages of development and negotiation. While gathering those documents, EPA segregated sensitive law enforcement documents for separate review.

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*/ Cited portions of this lengthy hearing transcript are attached hereto as Exhibit C. The entire transcript is available upon request.

22. Because the controversy with the Subcommittee was assuming more critical significance, it was brought to the attention of the Attorney General and by him to the President. Thereafter the Attorney General and the President found that sensitive law enforcement documents from open Superfund Act law enforcement files might, if disclosed, adversely affect pending Superfund enforcement action, overall enforcement policy or the rights of individuals. Exhibit E hereto.

23. On November 30, 1982, the President concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and, pursuant to the authority vested in him by the Constitution and laws of the United States, instructed Mrs. Gorsuch that such documents should not be made available to Congress or the public except in extraordinary circumstances. Exhibit E. On the same day, the Attorney General wrote to Chairman Levitas advising him of that policy. Exhibit F hereto.

24. Upon receiving this instruction, EPA intensively reviewed sensitive law enforcement documents from open Superfund Act law enforcement files to insure that no document was withheld from the Subcommittee except as instructed by the President. Michael Brown or I personally reviewed every such document preliminarily identified by EPA staff. We concluded that certain of those documents, if prematurely disclosed, would impair the government's ability to enforce the Superfund Act. Those documents were also reviewed by the Department of Justice. As of December 15, 1982, we had jointly decided to withhold sixty-four such documents. The Subcommittee was provided with lists, Exhibit G hereto, which identifed each of those documents and briefly

explained why each document was being withheld. The harm which disclosure of such documents would cause is discussed in paragraphs 16-18 above.

25. On December 2, 1982, Mrs. Gorsuch appeared before the Subcommittee and advised it that, because no National Priorities List of sites had yet been designated, no documents of the type described in the Subpoena were in existence. Exhibit C at 1. Nevertheless, in "a spirit of cooperation and comity," Mrs. Gorsuch advised the Subcommittee that she had instructed her staff to gather all documents concerning the 160 interim priority sites for production to the Subcommittee. Ibid. Such production would include more than 750,000 pages of documents and, if expedited, would cost approximately $245,000 and take more than two months to complete it would cost $145,000 and take more than five months to complete if done without overtime. Id. at 1-2. She tendered to the Subcommittee the first five file boxes of such documents, which she had brought with her to the hearing, but the Subcommittee declined to accept delivery of those documents. Id. at 4. Neither at that time nor at any subsequent time has the Subcommittee asked to examine any of the documents Mrs. Gorsuch brought to the hearing or offered to produce thereafter.

26. At the hearing, Mrs. Gorsuch also advised the Subcommittee that, pursuant to the President's instructions, sensitive law enforcement documents from open Superfund Act law enforcement files would not be made available. Id. at 3.

27. At the conclusion of the hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch to be in contempt for failure to comply with the Subpoena and reporting the matter to the full Committee. H.R. Rep. No. 968, 97th Cong., 2d Sess. (1982) ("Committee Report") at 57.

28. A further attempt was made to resolve the impasse between the Subcommittee and the Executive Branch at a meeting on December 8, 1982, but that attempt was unsuccessful. See letter from Assistant Attorney General Robert McConnell to Chairman Levitas, December 9, 1982, Exhibit H hereto; Committee Report at 22-23.

29. On December 10, 1982, the Committee reported the matter to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. Committee Report at 70.

30. On December 16, 1982, the House of Representatives cited Mrs. Gorsuch for contempt of Congress. Exhibit I hereto at 3.

31. On December 17, 1982, the Speaker and Clerk of the House of Representatives certified the contempt citation to the United States Attorney for the District of Columbia for criminal prosecution pursuant to 2 U.S.C. §§192 and 194. Exhibit I.

32. To develop cases effectively, EPA personnel both at Headquarters and the Regions must discuss each case in an open and candid manner among themselves and with the Department of Justice. The defendants' demand for sensitive law enforcement documents from open Superfund Act law enforcement files and their efforts to

prosecute Mrs. Gorsuch for her refusal to produce such documents have impaired EPA's ability to enforce the Superfund Act by impairing EPA's ability to assure its enforcement personnel that sensitive enforcement information, if reduced to writing, will not be prematurely disclosed.

33. The effective development of enforcement cases sometimes involves the use of information provided by confidential informants. The defendants' demand for sensitive law enforcement documents from open Superfund Act law enforcement files and their efforts to prosecute Mrs. Gorsuch for her refusal to produce such documents impair EPA's ability to enforce the Superfund Act by impairing EPA's ability to assure informants that, if they cooperate with the Agency, their identities and the information they provide will be effectively protected from premature disclosure.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on January 10, 1983.

Robert M. Perry
ROBERT M. PERRY

[illegible]

U.S. House of Representatives
Room 2165, Rayburn House Office Building
Washington, D.C. 20515
Telephone, Area Code 202, [illegible]

B-376 Rayburn Building
Washington, D.C. 20515
September 15, 1982

Honorable Anne M. Gorsuch
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mrs. Gorsuch:

In March of this year, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation initiated a series of hearings to examine the regulation of hazardous and toxic substance releases into the environment and their effects on ground and surface water quality. As part of this review, the Subcommittee is examining the efforts being made by federal, state and local governments, and others, to carry out the provisions of the "Superfund" law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510.

The effective conduct of this investigation will necessarily require the review of the progress being made to cleanup specific abandoned waste sites. Accordingly, this letter, in conformance with the provisions of Section 104(e)(2)(D) of P.L. 96-510, is to request that all information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency, be made available to the Subcommittee.

In that the Subcommittee's inquiry is of an ongoing nature, and can be expected to involve all activities underway in your Agency's ten regions, I recommend that you have the appropriate person on your staff contact Bob Prolman (225-3274) of the Subcommittee staff to work out the arrangements necessary to facilitate this request.

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PAGE 1 OF 2

Honorable Anne M. Gorsuch
Page Two
September 15, 1982

I look forward to your full cooperation and assistance in this matter.

With best wishes, I am,

Very truly yours,

Elliott H. Levitas
Chairman
Subcommittee on
Investigations and Oversight

EHL/tjm
cc: Mr. Robert Perry

PERRY DEC. EXH. A
PAGE 2 OF 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE
LEGAL AND ENFORC

Honorable Elliott H. Levitas
Chairman
Subcommittee on Investigations and Oversight
Committee on Public Works and Transportation
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Levitas:

I would like to express my appreciation to you and the other members of your Subcommittee and staff who met with Dr. Hernandez, John Daniel, members of my staff and me last Friday morning. I realize that your schedules were extremely crowded, particularly at that time, but I believe that the time spent was very productive.

On behalf of the Administrator, I acknowledge receipt of your letter to her of September 15, 1982, requesting that information being reported to or otherwise being obtained by this Agency, or any others acquiring such information on behalf of the Agency, within the purview of §104(e)(2)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, be made available to the Subcommittee.

As you know, in addition to our meeting last Friday, we have had other meetings and telephone conferences with representatives of your Subcommittee in an effort to understand the general universe of information you wished to have made available, and in order that our concerns regarding the sensitivity and confidentiality of enforcement-related material in our files be expressed and understood. We believe that we have embarked on an aggressive and effective enforcement program which is producing positive environmental results, and are most concerned that nothing jeopardize that program. Our discussion with you helped alleviate our concerns.

Pursuant to our discussions, we have contacted our Regional offices in New York and Boston, which we understand to be the two which your staff will visit first. We have instructed our Regional attorneys to cooperate fully with your staff, and to make available documents or information in our files regarding the sites or facilities in which you are interested.

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PAGE 1 OF 3

Internal enforcement documents which form the basis for on-going or anticipated civil or criminal prosecutions are extremely sensitive. These documents include, for example, memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, names of informants in criminal cases, and other similar material. Should you feel the need to review these documents, we would be very willing to discuss further with you the need or desirability of review of such documents, safeguards for protection of confidentiality, Agency policy regarding release or disclosure of such material, and the effect such disclosure may have on the enforcement or prosecution of the case. I am confident that, as we continue to work with you on this matter, we will be able to satisfy your Subcommittee's need for information, while at the same time, fully protecting the internal Executive Branch deliberative process associated with our execution of the law.

From our discussion, I know that you are fully aware of the sensitive nature of much of the information which will be reviewed or made available to you. For example, you will undoubtedly have access to the names of persons, firms or corporations who may, for a variety of reasons, be thought initially to have contributed hazardous substances to a site, only to find upon further investigation that the person, firm or corporation was not involved in such contribution. Any release of that information prior to its use in litigation could cause substantial damage, not only to the person, firm or corporation involved, but to the credibility of EPA's enforcement program.

You, the other Subcommittee members and your staff have all assured us that the information which you will receive or review will be treated with the utmost confidence, and will not be released to the press, the public or even to other members of Congress until the Agency has advised you in writing that such release would not jeopardize our enforcement efforts. I sincerely appreciate those assurances, which are being relied upon most heavily by us as the basis for our agreement.

Some of the documents in our files may be entitled to protection under 18 USC §1905, and improper disclosure of such documents can result in criminal penalties under that statute and §104(e)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. We will endeavor to identify such documents at the time they are made available, but your staff should also be aware of the potential consequences of improper disclosure of such material. [redacted]

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I believe that it is important to maintain close communications between your Subcommittee and the Agency regarding any issue which might arise regarding your request. Should your staff need to discuss any problem which arises, please have them contact Richard Mays, Special Assistant to the Enforcement Counsel, whose number is FTS 382-4146. Of course, I hope that you will call me directly if I can be of service.

Sincerely,

Robert M. Perry
Associate Administrator
and General Counsel

cc: Anne M. Gorsuch

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latter advising us that it was the Department of Justice's opinion that the subcommittee did not have the authority under the Superfund law to review the EPA's program enforcement related files.

On September 30, 1982, the subcommittee met in executive session and authorized the issuance of a subpoena to the EPA Administrator, and other Agency officials as necessary, and for documents, if EPA refuses the subcommittee access request.

This took place at that time due to the pending recess of the Congress and the fact that there were still outstanding matters to take place, specifically a response to the subcommittee chairman's earlier letter to the Administrator.

On October 1, 1982, EPA Deputy Administrator, John Hernandez, General Counsel Robert Perry, and other EPA staff with the subcommittee's chairman, Ranking Minority Member and Congressman Molinari, and subcommittee staff at Dr. Hernandez's request.

The EPA officials present assured the subcommittee that they would cooperate and provide access to, and copies of pertinent Superfund enforcement related files, and that they would so indicate in a response to the subcommittee chairman's earlier letter to the Administrator.

In response to questions bythe EPA officials present, the subcommittee members and, as usual, you, yourself, Mr.

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PAGE 1 OF 6

Chairman, assured that the confidentiality of the Agency's sensitive materials would be maintained.

On October 7, 1982, the subcommittee received a response to the chairman's letter to the EPA Administrator, signed by EPA Associate Administrator and General Counsel, Robert Perry, advising that the Agency would make their files available to the subcommittee, with the exception of enforcement related material.

On October 8, 1982, the subcommittee staff met with Mr. Perry and his staff at EPA headquarters to clarify the above-mentioned letter. Mr. Perry advised that he would send an additional letter clarifying the points of concern, and that the subcommittee would have access to the information it desired.

On October 12, 1982, the above-referenced follow-up letter from EPA, signed by Mr. Perry, was received by the subcommittee. The letter did not clarify or eliminate the enforcement-related information access exception noted in Mr. Perry's October 7 letter.

October 13-15, 1982, the subcommittee staff traveled to EPA Regions I and II (Boston and New York) to review certain Superfund site enforcement-related cases and attempted to obtain there enforcement-related documents.

This trip was taken at that time based on the comments that were being taken in good faith by the subcommittee that

PERRY DEC. EXH. C
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Administration's response to your subpoena of November 16 and to offer the reasons for that response.

Your subpoena, which I accepted personally on November 22, required ''all books, records, correspondence, memorandums[sic], papers, notes and documents'' created by EPA since December 11, 1980, for all hazardous waste sites ''listed as national priorities pursuant to Section 105(8)(B) of Public Law 96-510, the 'Comprehensive Environmental Response, compensation, and Liability Act of 1980.'''

As the committee is no doubt aware, no sites have been listed pursuant to that public law which requires, among other things, public notice and comment, and is finally subject to congressional veto. To date, the Agency has issued only an interim priority list, not under Section 105(8)(B). The subpoena, however, does not apply to any documents, therefore, in the possession or custody of EPA.

Nevertheless, in a spirit of cooperation and comity, and trying to assume the intent of the subcommittee, I have directed my staff to begin to gather all documents pertaining to the 160 sites now on EPA's interim priority list.

Applying the wording of your subpoena to the interim priority list would require the location, segregation, duplication, photocopying and shipping of more than 787,000

PERRY DEC. EXH. C
PAGE 3 OF 6

pages of documents. This material would fill more than 260 standard government file drawers--or about 52 filing cabinets.

Although I personally have grave doubts about the wisdom and the cost of requiring EPA to deliver such a volume of paper, following the direction of the President to cooperate with Congess wherever possible, the Agency is prepared to produce the majority of these documents as soon as possible.

The time and cost of providing all the documents associated with the interim priority list obviously depends on the importance placed on the request by the subcommittee. We estimate that a ''rush'' job, with the use of contractors, overtime, and the reassignment of resources and personnel within the Agency, could be completed between February 15th and March 1st, and would cost approximately $245,000. This will also require the virtual halt of some segments of our enforcement programs for several weeks.

Complying with the request without overtime, without neglecting the vital aspects of enforcement, and without the reassignment or reallocation of personnel or resources, would take more than 10,000 hours of staff time, which will cost roughly $145,000 and could probably be completed between May 15th and June 15th.

At this point, we estimate that EPA has already devoted nearly 1,000 staff hours and spent roughly $15,000 in our efforts. I believe certain documents have already been produced for the committee today.

In the interest of being perfectly candid with the subcommittee, however, I would like to inform you that sensitive documents found in open law enforcement files will not be made available to the subcommittee. To date, at least 23 such documents from our headquarters have been preliminarily identified, and a list of these is attached.

As the Attorney General stated in his letter of November 30:

''It has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances.''

Attorney General Robert Jackson, later Justice of the Supreme Court, wrote to Chairman Vinson in April of 1941:

''Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon.''

This was neither a new policy nor an innovative one, but one that dates from the founding of our nation. Even in the specific terms of law enforcement investigations, as early as 1904, Attorney General Knox refused to supply to the further to say or members of the committee would care to pursue it further. But I am going to try to restrict repetitious covering of the same subject.

Mrs. GORSUCH. I understand.

Mr. LEVITAS. As far as the documents that you have brought with you today, insofar as the committee is concerned they are not fully responsive to the subpoena of the committee. Under the circumstancs I would suggest that they be held in abeyance until the matter is resolved one way or the other, and that they be maintained in your custody until that time.

Mrs. GORSUCH. All right, Mr. Chairman. Thank you very much.

Mr. LEVITAS. Thank you very much.

Mr. Frolman, Mr. Esposito.

Mr. BONER. Mr. Chairman, while they are making their way up may I ask an inquiry to Representative Molinari? Did I hear him say that you had sought a particular case in your State, had sought information and on the grounds of what I would assume to be enforcement sensitive you were denied right to see that and that the cleanup of the disposal site was even approved by EPA itself. Yet finally after once again being told no, for whatever reason, I assume under the auspices of enforcement sensitivity, that you realized that the company that was cleaning up the site, in fact was

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ORIGINAL

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Robert S. Prolman and/or Sante J. Esposito

You are hereby commanded to summon ANNE M. GORSUCH, Administrator, United States Environmental Protection Agency, 401 M Street, S. W., Washington, D. C. 20460 to be and appear before the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives of the United States, of which the Hon. Elliott H. Levitas is chairman, and to produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," in their chamber in the city of Washington, on December 2, 1982 at the hour of 10:00 a.m. then and there to testify touching matters of inquiry committed to said Committee; and ~~he is~~ she is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 16th day of November 1982

James J Howard
Chairman.

Attest:

Edmund L Henshaw Jr
EDMUND L. HENSHAW, JR., Clerk.

PERRY DEC. EXH. D
PAGE 1 OF 2

ORIGINAL

Subpena for ANNE M. GORSUCH

Administrator,

U.S. Environmental

Protection Agency

before the Committee on the

Served 1-22-82

R S

House of Representatives

U.S. GOVERNMENT PRINTING OFFICE 80-483-6

PERRY DEC. EXH. D

PAGE 2 OF 2

THE WHITE HOUSE
WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

PERRY DEC. EXH. E
PAGE 1 OF 10

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

PERRY DEC. EXH. E
PAGE 2 OF 10

Office of the Attorney General
Washington, D.C. 20530

30 NOV 1982

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
  and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless,

it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
>
> "Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

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I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

> "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> "I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

> "[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all Members of the House shall have access thereto . . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. 1/ To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (see Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." United States v. Nixon, 418 U.S. at 705, quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).

1/ Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in United States v. Nixon, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under United States v. Nixon would be identical even if the Court had itself not used the word "public" in the relevant passage.

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PAGE 8 OF 10

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. 2/

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

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In closing, I emphasize that we have carefully reexamined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

William French Smith

William French Smith
Attorney General

Office of the Attorney General
Washington, D.C. 20530

30 NOV 1982

Honorable Elliott H. Levitas
Chairman
Subcommittee Investigations and Oversight
Committee on Public Works and Transportation
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I have had occasion to reiterate, in the attached letter to Chairman Dingell of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the historic position of the Executive Branch that it is not in the public interest for sensitive documents found in open law enforcement files to be given to Congress or its committees except in extraordinary circumstances. I am aware that your Subcommittee has issued to Administrator Gorsuch of the Environmental Protection Agency ("EPA") a subpoena apparently seeking copies of some 787,000 documents found in open law enforcement files related to approximately 160 hazardous waste sites located throughout the United States. At least 23 and probably more documents covered in your Subcommittee's subpoena are of that class covered by my letter to Chairman Dingell, since they reflect prosecutorial strategy and other internal deliberations regarding prosecution of the particular cases involved.

Because the principles articulated in the attached letter to Chairman Dingell are fully applicable to some of the documents arguably within the scope of your Subcommittee's subpoena, I believe it appropriate to provide you with a copy of that letter at this time. Because neither I nor my staff have previously communicated directly with you on this particular matter, I would also like to express my hope that, after you have had the benefit of my views on this issue, set in their historical perspective, you will no longer seek to compel production of this class of documents from the Administrator. Should you wish to discuss this matter further prior to the Subcommittee's scheduled December 2 hearing, I would ask that you contact Assistant Attorney General McConnell of my Office of Legislative Affairs at your convenience.

[redacted]

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I would also add that I am confident that the legislative needs of your Subcommittee can be met without the production by the Administrator of sensitive documents in open law enforcement files. That is certainly the lesson that history teaches, and I believe you will agree that it is incumbent on both of our Branches to avoid constitutional confrontations so long as the needs and prerogatives of each Branch can be harmonized.

Sincerely,

William French Smith
Attorney General

Office of the Attorney General
Washington, D.C. 20530

30 NOV 1982

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

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Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

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it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
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I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> "I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

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1/ Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in United States v. Nixon, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under United States v. Nixon would be identical even if the Court had itself not used the word "public" in the relevant passage.

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PAGE 8 OF 10

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These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

In closing, I emphasize that we have carefully re-examined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

William French Smith

William French Smith
Attorney General

Description of documents withheld from production pursuant to the subpoena received by Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, on November 22, 1982, from the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives requesting certain described documents for hazardous waste sites on a non-existant list but presumed to be the EPA Interim Priority List of 160 sites.

1. Memorandum dated September 2, 1982, from Jackson L. Fox, Attorney, Environmental Enforcement Section, Department of Justice, to Stephen D. Ramsey, Chief, Environmental Enforcement Section, DOJ, entitled "Litigation Strategy - U.S. v. Hooker Chemical and Plastics Corp. et al. (Love Canal)". This memorandum details EPA's and DOJ's litigation strategy for this case. 5 pages.

2. Memorandum dated November 10, 1982, from William J. Walsh and John H. Wheeler, Attorney-Advisors, Office of Enforcement Counsel, EPA, to R. Charles Morgan, Chief Technical Coordinator, Love Canal Litigation, Office of Waste Programs Enforcement, EPA, entitled "Initial List of Love Canal Technical Tasks". This memorandum outlines the government's techical case, discusses proposed exhibits and lists potential expert witnesses. 8 pages.

3. Memorandum (undated) from Jim Dragna, Attorney-Advisor, Office of Enforcement Counsel, EPA, to Edward A. Kurent, Associate Enforcement Counsel-Waste, Office of Enforcement Counsel, EPA, entitled "Chem-Dyne Settlement". This memorandum discusses the Agency's final settlement proposal in this case and highlights the issues to be considered before proceeding. It reveals the thought processes of the case attorney and the concerns of the Agency in multi-party settlements. 3 pages.

4. Memorandum (undated) from Robert B. Schaefer, Regional Counsel, Region V, EPA, and Edward Kurent, Associate Enforcement Counsel-Waste, to Michael A. Brown, Enforcment Counsel, EPA, entitled "Treatment of Non-Settling Responsible Parties at the Chem-Dyne Site". This memorandum discusses litigation strategy for this case. 5 pages.

5. Memorandum dated November 4, 1982, from Edward Kurent, Associate Enforcement Counsel-Waste, Office of Enforcement Counsel, EPA, to Michael A. Brown, Enforcement Counsel, EPA, entitled "United States v. Solvents Recovery Serviceof New England, (Civil No. H-79-704, D. Conn.) This memorandum discusses trial strategy in this case, including evidentiary deficiencies and legal issues relating to burden of proof. 2 pages.

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6. Memorandum dated September 2, 1982, from Mitchell E. Burack, Attorney-Advisor, OLEC, to Ed Kurent, Associate Enforcement Counsel, entitled "Seymour Recycling". This memorandum is a discussion of settlement strategy, including weaknesses and unresolved issues in the settlement approach. 2 pages.

7. Document dated September 28, 1982, entitled "Litigation Report - American Surplus Sales Company". This is a detailed litigation report on a case sent to EPA Headquarters for review and referral to the Department of Justice for filing. It reveals the factual and legal basis for the referral, names of witnesses, anticipated defenses and the government's means of addressing these defenses, weaknesses in the government's case and the litigation strategy for the case. 19 pages.

8. Memorandum dated July 15, 1982, from Dick Whittington, P.E., Regional Administrator, Region VI, EPA, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, EPA, entitled "Crystal Chemical Co., Houston, Texas; Cost Recovery Action Under Section 107(a) of CERCLA". This memorandum summarizes a potential cost recovery action under CERCLA for review by EPA Headquarters and possible referral to the Department of Justice for filing. It discusses weaknesses in the government's case and discussess defenses that the potential defendant's could raise. 20 pages.

9. Memorandum dated May 27, 1982, from J. Howard Beard, III, Environmental Scientist, Office of Waste Programs Enforcement, and Jim Kohanek, Attorney, Office of Legal and Enforcement Counsel, to The Record, entitled "Meeting with the Owner/Operator of Lenoir Refining Company", together with a Routing and Transmittal Slip to Jim Kohanek dated May 13, 1982, with attached listing of drums. This memorandum lists the number and source of drums at the above mentioned site. 4 pages.

10. Memorandum dated October 28, 1982, from Barbara L. Peterson, Attorney, Office of Regional Counsel, Region VII, EPA, to James Kohanek, Attorney, Office of Legal and Enforcement Counsel, entitled "Responsible Parties-Callahan Site", with attached listing of drums. This memorandum lists potentially responsible parties and the basis for linking these parties with drums at the above mentioned site. Further, weaknesses in the case and a basis for settlement are discussed. 6 pages.

11. Memorandum dated August 3, 1982, from Edward A. Kurent Acting Associate Enforcement Counsel-Waste, through Michael A.

Brown, Acting Enforcement Counsel, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, entitled "Potential Settlement of U.S. v. Burns, et al. Civil Action No. 80-1424 (W.D. Pa., filed Oct. 3, 1980)". This memorandum discusses the weaknesses in the above mentioned case and the government's view concerning possible settlement of the case. 3 pages.

12. Memorandum dated May 21, 1982, from Michael A. Brown, Acting Enforcement Counsel, to William N. Hedeman, Director, Office of Emergency and Remedial Response, entitled "Superfund Spending Authorization - Miami Drum Services Company Site (Dade County, Florida)". This memorandum discusses the weaknesses in the government's case and potential defenses for the defendants at this site. 2 pages.

13. Letter dated September 3, 1982, to Ed Kurent, Acting Associate Enforcement Counsel-Waste, Office of Legal and Enforcement Counsel, EPA, from Lloyd S. Guerci, Assistant Chief, Environmental Enforcement Section, Department of Justice, regarding U.S. et al v. County of Hillsboro ("Taylor Road"): Technical Support for Trial Preparation. This letter discusses weaknesses in the government's case. 13 pages.

14. Memorandum dated October 25, 1982, from Edward A. Kurent, Acting Associate Enforcement Counsel, through Michael A. Brown, Acting Enforcement Counsel, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, entitled "Status of Outboard Marine Corporation (OMC), Waukegan, IL". This memorandum outlines the government's negotiation/litigation strategy at this site, including an analysis of the government's evidence. 6 pages.

15. Memorandum dated November 8, 1982, from Robert Van Heuvelen, Attorney, Department of Justice, to Stephen D. Ramsey, Chief, Environmental Enforcement Section, et al, entitled "Resolution of Generator Cases Where Less Than Full Cleanup Is Committed by Responsible Parties". The memorandum discusses weaknesses in a government case. 5 pages.

16. Memorandum dated August 20, 1982, from Dick Emory, attorney, Office of Legal and Enforcement Counsel, EPA, to Mary Douglas Dick, Attorney-Advisor, entitled "Denver Radium Sites; Liability of Present Landowners". Discusses weaknesses in any potential case. 2 pages.

17. Memorandum dated November 15, 1982, from Dick Emory, attorney, Office of Legal and Enforcement Counsel, EPA, to Ed Kurent and Fred Stiehl, Acting Associate Enforcement Counsel-Waste and Acting Deputy Associate Enforcement Counsel-Waste, respectively, entitled "Accelerating the RI and the FS, and

Reconsidering the Role of Cost-Effectiveness". This memorandum discusses a problem with case preparation for two cases and the strategy and coordination needs for proving the remedial portions of cases under §106, CERCLA. 5 pages.

18. Memorandum dated November 16, 1982, from M. Elizabeth Cox, Attorney/Advisor, Office of Enforcement Counsel, to Edward A. Kurent, Associate Enforcement Counsel-Waste, entitled "Homestake Mining Co., Milan, N.M.". This memorandum discusses the government's negotiating position in ongoing negotiations. 4 pages.

19. Four (4) related letters/memoranda related to Raser Tannery, Inc., a case referred to EPA Headquarters from Region V, described as follows:

(1) Letter dated May 14, 1982, from Steven R. Baer, Attorney, Environmental Enforcement Section, DOJ, to James Bunting, Deputy Enforcement Counsel, EPA. This letter highlights unresolved issues in the case. 2 pages.

(2) Memorandum dated August 30, 1982, from Helen Keplinger, Attorney-Advisor, Office of Enforcement Counsel - Waste, to the File, entitled "Region V Meeting (7-22-82) - Raser Tannery, Ashtabula, OH". This memorandum discusses the case development and unresolve factual issues. 1 page.

(3) Letter dated September 1, 1982, from Eric P. Dunham, Assistant Regional Counsel, EPA Region V, to Helen Keplinger, Office of Enforcement Counsel, EPA, on Raser Tannery. This letter again identifies unresolved issues. 1 page.

(4) Letter dated October 21, 1982, from Pierre Talbert, Assistant Regional Counsel, EPA Region V, to Helen Keplinger. This letter discusses, in depth, EPA's basis for suit. 2 pages.

20. Memorandum dated December 15, 1981, from Julio Morales--Sanchez, Director of Enforcement Division, EPA Region II, to Christopher Capper, Assistant Administrator for Solid Waste and Emergency Response, EPA, and William Sullivan, Enforcement Counsel, EPA, entitled "Discussion of Settlement in Price's Landfill Case: Joint and Several Liability". This memorandum discusses settlement options and a settlement approach in this case. 4 pages.

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21. Memorandum dated August 17, 1982, from Regional Counsel, Region IV, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, EPA, entitled "PCB Roadside Spill Sites, North Carolina, Settlement Proposal of Robert Earl Ward, Jr.". This memorandum discusses the pros and cons of a settlement offer in this case. 13 pages.

22. Document dated August 6, 1982, entitled "Evidence Concerning Disposal by ICI Americas, Inc., at Tybouts Corner. United States v. New Castle County et al., Civ. No. 80-489 (D. Del.). (Supplement to Prior Memorandum Concerning Third Party Generators)". Distribution of this document is also restricted by order of the U.S. District Court. These documents summarize evidence gathered by a potentially responsible party at the above mentioned site. The documents are subject to an explicit protective order issued by the Court. 15 pages.

Also apparently intended to be covered by the above referenced subpoena and withheld from production are the documents withheld from the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives pursuant to a subpoena served on Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency on October 21, 1982, and further described in the attached document.

Description of documents withheld from production pursuant to the subpoena received by Anne M. Gorsuch, Administrator, Environmental Protection Agency, on October 21, 1982, from the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives requesting certain described documents on the Stringfellow, California, Tar Creek, Oklahoma and Berlin and Farro, Michigan sites.

1. Case Development Plan for Stringfellow, prepared by Sonia Crow, Region 9 Administrator, to Robert Perry, Associate Administrator for the Office of Legal and Enforcement Counsel. Withheld portions enumerate several "Anticipated Defenses" that the responsible parties could raise. Additional sections discuss elements of proof, legal issues/strategy, potential expert witnesses, and the bases for most evidence that the Government will introduce. Precedential issues are also raised and discussed, which would directly affect our settlement and/or litigation positions. All but 8 pages of this document have been turned over. Undated.

2. Internal EPA schedule labeled "Responsible Party Cleanup Plan." Prepared by Harlan Agnew, Attorney-Adviser, Region 9. This Plan sets forth a schedule of tasks to be accomplished by the Stringfellow Case Development Plan before the generator meeting, and for the follow-up negotiations with responsible parties. Disclosure of this document would identify continuing legal and strategy issues which would be harmful to the Government's case. 7 pages, dated September 17, 1982.

3. Memorandum to Files from K. Kenworthy, Team Leader for California, Hawaii, and Trust Territories, Region 9, to Files, 2 pages, undated, recording telephone conversation with Harry Schueller, California State Water Resources Control Board, regarding the Inspector General's audit of grant to the State of California. 2 pages, undated.

Available to Subcommittee: 2 pages, dated August 25, 1982.

4. Memorandum of telephone conversation from Kathy Kenworthy, Team Leader for California, Hawaii, and Trust Territories, Region 9, to Jim Winchell, State Water Resource Control Board, discussing potential defenses of a potential defendant in a cost recovery action. 1 page, dated September 23, 1982, 2:30 pm.

Available to Subcommittee: 1 page, dated September 23, 1982, 10:45 am.

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5. Draft memorandum from Terry Brubaker, Chief, Emergency Response Section, Region 9 to "T-3, T-3-1, ORC, T-1" (various program offices and Office of Regional Counsel) regarding the Stringfellow Timetable for Responsible Party Negotiations. This memo establishes a timetable for proceeding with negotiations, including prospective activities which have yet to occur. It also contains evaluation and opinion of EPA staff concerning the possibility of settlement. 2 pages, dated August 26, 1982.

6. Enforcement and Funding Strategy Outline, with handwritten annotations. This document is a step-by-step outline which identifies issues and tasks that must be addressed for the generator meeting and follow-up negotiations and/or litigation. It sets forth litigation and negotiation strategy. 3 pages, dated September 9, 1982.

7. Documents from Headquarters EPA Legal Files regarding the Stringfellow site, containing copies of items #2, 5, and 6, plus handwritten notes discussing the cooperative agreement, and impressions of meetings wherein the structure of settlement negotiations was discussed. Some of these items come from the files of Kathy Summerlee, Chief, Branch "C", Office of Enforcement Counsel-Waste and are dated August 31, September 7, and 27, 1982. 21 pages total.

8. Copies of Notes for Stringfellow Case from Heidi Hughes, Attorney-Adviser, Office of Enforcement-Waste, EPA. These notes discuss negotiation and litigation strategies, including interactions and negotiations with the State, identification and evaluation of potential legal strategies of defendants, develops strategies for initial meeting with generators, and establishes schedule for negotiations. 11 pages, dated August 27 and 30, September 7 and 10, 1982.

9. Available to Subcommittee.

10. Handwritten draft of a memorandum from Jerome Muys, Attorney, Office of Enforcement Counsel and Kevin Garrahan, Engineer, Office of Waste Programs Enforcement to Edward Kurent, Acting Associate Enforcement Counsel-Waste, and Gene Lucero, Director, Office of Waste Programs Enforcement discussing recoverability of CERCLA expenditures at Berlin and Farro site. Disclosure of this document could reveal potential defenses for potential defendants in enforcement actions. 3 pages, dated August, 1982.

11. Notes of Jerome Muys, Attorney, Waste Enforcement Division of July, 1982 meeting with the Michigan Department of Natural Resources regarding enforcement history of Berlin & Farro site. This memorandum discusses evidence concerning disposal practices and potentially responsible parties at Berlin and Farro. 2 pages, undated.

12. Notes of Mitchell Burack, Attorney, Waste Enforcement Division discussing negotiations with generators for the Berlin & Farro site and the pre-meeting with the State. These notes discuss evidentiary bases of the Government's case and potential defenses, and the author's subjective analyses of both. 6 pages, dated July 29, 1982.

13. Available to Subcommittee.

14. Notes of Mitchell Burack, Attorney, Waste Enforcement Division, taken during a meeting with Michigan Department of Natural Resources, discussing strategy, scheduling of site activity, negotiations with potential responsible parties, and some discussion of evidence against potential generators. 4 pages, dated July 28, 1982.

Available to Subcommittee: 1 page, undated.

15 & 16. Typed versions of item # 10. 2 pages each, undated

17. Notes of Mitchell Burack, Attorney, Waste Enforcement Division, recording mental impressions of his meeting with Berlin and Farro generators, discussing potential for settlement without litigation and subjective analyses of the Government's evidence. 4 pages, dated July 29, 1982.

18. Draft Memorandum to William Hedeman, Director, Office of Emergency and Remedial Response, from Gene Lucero, Director, Office of Waste Programs Enforcement, prepared by Kevin Garrahan, Engineer, Office of Waste Programs Enforcement, discussing the time frame for proceeding with negotiations with potential defendants at the Berlin and Farro Site, as well as substantive positions to be taken in negotiation. 3 pages, undated.

19. Available to Subcommittee.

20. Typed version of item # 10. 2 pages, undated.

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21. Memorandum from Kevin Garrahan, Environmental Engineer, Office of Waste Programs Enforcement and Jerome Muys, Attorney, Office of Legal Enforcement Counsel to Gene Lucero, Director, Office of Waste Programs Enforcement, Edward Kurent, Acting Associate Enforcement Counsel for Waste, and Karen Clark, Attorney, Office of General Counsel, containing advice of EPA legal and technical staff concerning remedial steps to be taken at Berlin and Farro, as well as mental impressions concerning pending negotiations among EPA-Region V, the State of Michigan and industry officials. 2 pages, undated.

22. Available to Subcommittee.

23. Handwritten draft of item #10. 2 pages, undated.

24. Available to Subcommittee.

25. Available to Subcommittee.

26. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel discussing meeting with Kevin Garrahan, Engineer, OWPE, concerning progress of Berlin and Farro case development. This document discusses potential strengths and weaknesses of the Government's cost recovery action. 2 pages, dated September 7, 1982.

27. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel of meeting with Jane Shulteis, Branch Chief, Office of Regional Counsel, discussing Berlin and Farro negotiation strategy. This document contains mental impressions of an EPA attorney about settlement negotiations and discusses evidentiary bases of actions against potential responsible parties. 2 pages, dated August 26, 1982.

28. Available to Subcommittee.

29. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel of conference call with Richard Bartelt, Branch Chief, Office of Superfund, and Jerome Muys, Attorney, Waste Enforcement Division, discussing potential strategy to seek voluntary settlement. 3 pages, dated June 18 and July 2, 1982.

30. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel of meeting with William Constantelos (Director) and Richard Bartelt, Branch Chief, Office of Superfund, and David Ullrich, Branch Chief, Roger Grimes, Section Chief, and

Jane Shulteis, Section Chief, Office of Regional Counsel, where substance of negotiations was discussed. 2 pages, dated July 12, 1982.

This document also includes notes of Gloria Small Moran, Attorney, Office of Regional Counsel, of conversation with Andrew Hogarth, Branch Chief, Michigan Department of Natural Resources regarding deadline for negotiations with generators. 1 page, dated July 14, 1982.

Available to Subcommittee: 2 pages of this document, dated July 13, 1982.

31. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel, of meeting with Michigan Department of Natural Resources re Berlin and Farro negotiations. This document discusses evidentiary bases of the Government's claims of liability against potential defendants. 5 pages, dated July 9, 1982.

This document also contains notes of Gloria Small Moran, Attorney, Office of Regional Counsel, of conversation with Jerome Muys, Attorney, Waste Enforcement Division, regarding Berlin and Farro negotiation strategy. 1 page, dated July 18, 1982.

32. Internal legal memorandum from Joseph Freedman, Attorney, Water & Solid Waste Division, to William Hedeman, Director, Office of Emergency & Remedial Response, discussing issue of recoverability of response costs for seepage from abandoned ore mines. 6 pages, dated January 11, 1982.

33. Memorandum from James Bunting, Acting Deputy Associate Enforcement Counsel to Wiliam Hedeman, Director, Office of Emergency and Remedial Response, (cc: Pete Broccoletti, Bruce Diamond, Coke Cherney, Joseph Freedman), discussing the Enforcement Counsel's reactions to document 32 in the course of developing the agency's position on the issue. 1 page, dated February 5, 1982.

34. Memo from Colburn T. Cherney, Assistant General Counsel, to Bruce M. Diamond, Acting Associate General Counsel and Christopher Capper, Acting Assistant Administrator for Soild Waste and Emergency Response discussing the strengths and weaknesses of document 32. 1 page, dated March 9, 1982.

35. Handwritten note, discussing inter alia, negotiation strategy and Agency settlement documents to be drafted,

relevant to Tar Creek site. 1 page, undated.

36. Draft memorandum from Robert D. Wyatt, Acting Deputy Regional Counsel for Enforcement Coordination to Sonia F. Crow, Regional Administrator, through Robert Thompson, Regional Counsel and David Mowday, Director, Toxics and Waste Management Division, Region 9, discussing legal theories and potential liabilities of potential defendants, and the application of the CERCLA to the site. 6 pages, dated August 30, 1982.

37. Personal notes of meetings of Robert C. Thompson, Regional Counsel, Region 9, outlining various meetings held in Region 9 and Headquarters, in which were discussed negotiation schedules, available evidence and litigation strategy. These notes contain the mental impressions of the Regional Counsel of the Stringfellow case strategy discussed in the meetings. 16 pages, dated Aug. 2, 5, 16, Sept. 1, 9, 14, 21, 24, 1982.

38. Available to Subcommittee.

39. Memoranda of discussions of Sonia Crow's (Regional Administrator) with William Hedeman and Mary Nichols (California Department of Health Services) regarding Superfund cost-recovery action, 3 pages, dated January 28, 1982.

40. Same document as #36 with references to Stringfellow deleted.

41. Robert C. Thompson's (Regional Counsel) handwritten notes of meetings and telephone conversations, discussing Stringfellow Cleanup Plans and Settlement Strategies, 9 pages, dated July 29, 30, Aug. 2-5, 10-12, 1982.

42. Robert C. Thompson's handwritten notes of meetings and telephone conversations discussing Stringfellow strategy, 8 pages, dated Oct. 5, Aug. 19, 20, 25, 26, Sept. 1-3, 1982.

43. Handwritten notes of Robert Thompson, reflecting staff discussions regarding potential recovery from Stringfellow generators, 7 pages, dated September 15-17, 21, 24, 27, Oct. 21, 1982.

44. Handwritten notes of Robert C.Thompson, discussing his impressions of various meetings regarding cost-recovery strategy with Headquarters, Regional, and State personnel. 20 pages, dated October 7, 8, and 18, 1982.

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45. Draft Cost Recovery Plan for Stringfellow site, prepared by Robert C. Thompson, Regional Counsel. This document outlines a cost-recovery plan and addresses issues and tasks that are likely to arise before and during the negotiation and litigation processes. 6 pages, dated July 30, 1982.

46. Memo from Harlan Agnew, Attorney, Office of Regional Counsel, Region 9 through Robert C. Thompson, Regional Counsel to David S. Mowday, Acting Director, Toxics and Waste Management Division, entitled "Proposed Strategies for Cost Recovery - Stringfellow". The memo discusses tasks that must be accomplished and a timetable for doing them. It discusses notice letter mailings and projects' negotiation developments. 2 pages, undated.

47. Robert C. Thompson's draft entitled Cost Recovery Plan - Stringfellow site. This document lists the "three track" approach to settlement. It discusses near-term and long-term strategy issues. 3 pages, dated September 7, 1982.

48. Proposed "MOU Regarding Joint Negotiations and Litigation Concerning the Stringfellow site, Riverside, CA." This document describes how EPA and the California Department of Health Services will conduct negotiations with responsible party generators and attempts to establish operating procedures between the two agencies for this case. 5 pages, undated.

49. Memorandum from Susan Conti, Law Clerk, Office of Enforcement Counsel-Waste to Heidi Hughes, Attorney-Adviser, OEC-W. This document analyzes federal and California law on the issue of settlement and release of joint tortfeasors. 8 pages, undated.

50. Draft document entitled "Terms of Negotiation." This document delineates the contours of an acceptable agreement with the responsible parties. 2 pages, dated October 25, 1982.

51. Available to Subcommittee.

The above described documents have been reviewed by the following named individuals on behalf of the Environmental Protection Agency and these individuals have determined that the documents withheld meet the criteria set forth in the President's memorandum of November 30. 1982, to Anne M. Gorsuch, Administrator, Environmental Protection Agency as further described in the letter of William French Smith, Attorney General of the United States to John Dingell, Chairman, Oversight and Investigations Subcommittee, Committee on Energy and Commerce, U.S. House of Representatives, dated November 30, 1982.

DEC 13 1982

Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel

DEC 13 1982

Michael A. Brown, Enforcement Counsel

These documents have been reviewed on behalf of the Land and Natural Resources Division, Department of Justice by the following individuals and determined to meet the criteria described above.

Carol E. Dinkins

DEC 13 1982

Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice

Stephen D. Ramsey

DEC 14 1982

Stephen D. Ramsey, Chief, Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice

Mary Walker

DEC 14 1982

Mary L. Walker, Deputy Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice

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Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

9 DEC 1982

Honorable Elliott H. Levitas
Chairman, Subcommittee on
Investigations and Oversight
Committee on Public Works
and Transportation
House of Representatives
Washington, D..C 20515

Dear Mr. Chairman:

Thank you for meeting with Assistant Attorney General, Office of Legal Counsel, Theodore B. Olson, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the Environmental Protection Agency, Robert M. Perry, and me yesterday afternoon regarding the apparent impasse which presently exists between your Subcommittee and the Administration regarding your Subcommittee's subpoena for copies of documents generated by the Environmental Protection Agency ("EPA"). Your Subcommittee is interested in receiving copies or examining all documents generated by the EPA in its enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The outstanding subpoena (the validity of which has not been conceded) seeks production of a large quantity of such documents and your Subcommittee has taken the position that none of them may be withheld from it. Your Subcommittee has voted to find the Administrator of the EPA in contempt of Congress for not producing some of the subpoenaed documents notwithstanding that she is acting in compliance with an instruction from the President and the advice of the Attorney General.

As you know, the President and the Attorney General have expressed the concern that a narrow range of documents contained in sensitive open law enforcement investigative files, the disclosure of which (at least while a case is pending or in the development stage) might adversely affect a pending or potential enforcement action or the rights of individuals, should not be released by the Executive Branch because doing so would be inconsistent with the President's constitutional obligation to take care that the laws be faithfully executed. These documents are few in number (undoubtedly less than 1% of the enforcement files) and relate primarily to tactics and strategy

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in the development of a particular case against particular potential defendants (lists of prospective witnesses, legal discussions and the like). At the same time, the Administration does not and will not contest the right of your Subcommittee to the factual and technical information about which you and members of your Subcommittee (particularly Congressman Roe) expressed such concern at your hearing on December 2, 1982 as well as information regarding enforcement efforts, enforcement policy, and enforcement directions and results to date. Your Subcommittee, however, has determined that this is not sufficient and you continue to assert the right to inspect every document in EPA's enforcement files.

In the spirit of attempting to reach a compromise solution to this impasse, and with full reservation of the Subcommittee's rights and the rights of the Legislative Branch as a whole, yesterday you proposed an accommodation which would include the following solution:

1. Staff of your Subcommittee would be permitted to have access to all EPA documents relative to the 160 hazardous waste sites in issue.

2. Subcommittee staff would have the unrestricted right to examine the EPA documents and determine what documents it wished to have copied and produced for further staff work or made available to the Subcommittee.

3. EPA and/or Justice Department enforcement officials would then examine the documents which the Subcommittee staff designated for copying and designate those documents which were considered by the Executive Branch to be sufficiently sensitive to an open enforcement proceeding (including the case development phase) that dissemination beyond the Executive Branch would adversely affect the ability of the Executive Branch to enforce the law. Copies of those documents would be made and transferred to EPA headquarters in Washington but would not be provided to the Subcommittee. Copies of all the other documents designated by the Subcommittee staff would be furnished to the Subcommittee.

4. Members of the Subcommittee and staff members */ would be permitted to examine the particularly

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*/ You may have suggested that access at this point would be limited to the Chairman and the Ranking Minority Member and selected staff members. Our recollection on this point is not clear and we would welcome a clarification if we have misunderstood your position.

sensitive documents at EPA headquarters in Washington under Executive Session Rules so that the documents would not be physically turned over to the Subcommittee and would not therefore have to be made available to every member of the House of Representatives pursuant to the Rules of the House of Representatives.

5. If the Subcommittee thereafter determined that it needed to have copies of any of the particularly sensitive documents, it would then have the right to pursue efforts to obtain copies of those documents through the mechanism of a subpoena.

6. Members of the Subcommittee and the staff would treat the information contained in the enforcement sensitive documents as confidential but, as you noted in response to a question, the Subcommittee would not waive its right to utilize the information in any way which it found to be proper and appropriate.

I believe I have correctly summarized your proposal but, since I was not taking notes, I may have overlooked some aspect of it. If so, please correct me as promptly as possible because we wish to make sure that we respond to your proposal and not to something which we have misunderstood to be your proposal.

The principal problem which we have with the foregoing proposal is that it contemplates that the President will lose control over the contents of materials which those who assist him in enforcing the law have determined to be in a narrow category of documents the release of which would adversely affect the Executive Branch's ability to enforce the law. Accordingly, we are not in a position to accept your proposal. We believe, however, that a somewhat modified version of it would be acceptable to the President and should fully address your concerns. It may not eliminate every area of dispute, but it would narrow the focus of the dispute so substantially that any remaining areas of disagreement could, if absolutely necessary, be resolved in an appropriate fashion by the judiciary.

We observe in passing that one of our problems with your proposal is that we feel that it would be extraordinarily difficult to withhold access to a particular document to any committee or subcommittee of Congress if we made such access available to one Subcommittee and its staff or to some members of Congress. It is not for the Executive to distinguish between the rights of particular members or particular committees. Second, as noted above, the proposal contemplates that the Executive would part with control over the information in the sensitive enforcement documents. Members of the Subcommittee staff would, at the outset, have unfettered access to sensitive enforcement files. It is a logical and legal consequence of the President's responsibility faithfully to execute the law that material should not be released from his control if he determines that release of that material would impair enforcement efforts.

Your proposal contains an ingredient for postponing the dispute with respect to certain documents, i.e., those which the Subcommittee, after undertaking the process described above, decides that it must nonetheless have in its possession. Our counter-proposal similarly reserves the rights of the two branches to resolve at a subsequent time any remaining disputes as to any particular documents. Our proposal (which is, of course, predicated on the concept that it would resolve the pending dispute over all presently outstanding subpoenas) is as follows:

1. The Subcommittee staff would be given access to all EPA enforcement files relative to the 160 hazardous waste sites in which you have an interest. Those files would remain where they are now, either at EPA headquarters or at the regional offices, respectively. Your staff members would provide notice, in advance, of which files were going to be examined so that EPA officials could initially examine the files to isolate those documents which were particularly sensitive from an enforcement standpoint. Those documents would be removed from the files and the remaining balance of the EPA enforcement files would be made available to your Subcommittee staff and ultimately to the Subcommittee, subject to some appropriate understanding regarding confidential treatment with respect to certain materials in those files. We expect the vast majority, probably in excess of 99% of the enforcement files, would be made available to the Subcommittee and the staff in this fashion. After examining the remaining files and after having been advised what documents had been set aside from the files, and after a briefing on the general nature of the contents of such withheld materials, your staff could determine whether it was, in fact, necessary, in their judgment, to examine those files.

2. Those withheld documents considered sensitive would then be analyzed by at least four persons, two in EPA and two in the Land and Natural Resources Division of the Department of Justice. One person in EPA and one of the Justice Department individuals involved in this process would be professional, career attorneys engaged

in the EPA enforcement process and, at Justice, in that section of the Department responsible for enforcement of CERCLA. In addition, one EPA official and one Justice Department official responsible for examining the withheld documents would be persons holding policy level positions. The Justice Department official would be a Deputy Assistant Attorney General. If those four individuals concurred that a particular document was sufficiently sensitive that its release would adversely affect the ability of the Executive to enforce the law, that document would be considered for withholding by the Executive Branch. Thereafter, those documents would actually be withheld only if the conclusions regarding their sensitivity were concurred in by an additional member of the Department of Justice in the Office of Legal Counsel and by an attorney in the Office of Counsel to the President. In short, the document would be withheld only if the collective judgment of the foregoing individuals was that the document needed to be withheld under the foregoing standards. If so, that document would be described to you in detail and the Executive Branch would set forth its reasons why it believed that the document should not be disclosed.

3. If the Subcommittee and its staff disagreed with the Executive Branch's position concerning the need for confidential treatment of the document in question or if it had additional reasons for why the document should be produced, those conclusions and those reasons would be articulated to the Executive Branch and the document in question would be reviewed again with those additional considerations in mind.

4. Only if the foregoing process did not lead to a resolution of the dispute with respect to the document in question would it be necessary to proceed further. At that point if the Subcommittee was not satisfied with the good faith and the legitimacy of the position of the Executive Branch, the Subcommittee would retain all rights that it presently has to pursue all lawful efforts to obtain the document in question.

We believe that this process is reasonable. It insures that no document will be withheld unless career enforcement lawyers and policy officials at two separate agencies and an attorney in the Office of Counsel to the President believe that the document should be withheld. Documents will not be withheld in order to shield illegal conduct by Executive Branch persons. Furthermore, even after the process described above, EPA and the Department of Justice would remain willing to discuss factual information contained in any withheld documents and would be willing to discuss particular needs that the Subcommittee may still have. Finally, the Subcommittee, under this process, will still have all rights which it presently has to seek the mandatory production of the document through legal processes.

We understand that you do not agree that the Executive Branch has the right to withhold any documents from the Legislative Branch and that you feel that it is not appropriate for the Executive Branch to make any "unilateral" determination relative to the withholding of any document. We respectfully disagree with your position that no documents may be withheld by the Executive Branch and the position which follows from it, that the documents must be given to the Legislative Branch so that the Legislative Branch might unilaterally determine how the documents will be handled. We believe that the position we have taken is the only one which is consistent with the Constitution. We submit that our position does not involve a final determination by the Executive Branch from which the Legislative Branch has no legal recourse, but it similarly does not allow for a final unreviewable determination by the Legislative Branch. In fact, our position is the only approach which allows for each Branch to maintain a legitimate difference of opinion regarding the release of any particular document and, if necessary, enables the Judicial Branch ultimately to resolve the issue without an irreparable waiver of the rights of either the Legislative Branch or the Executive Branch.

We thank you for your courtesy, and we hope that the foregoing will allow us to resolve what we regard to be an unnecessary dispute between co-equal branches of the government of the United States.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

cc: Congressman Don H. Clausen
Ranking Minority Member
House Committee on Public Works and Transportation

PERRY DEC. EXH. H
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The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw Jr.
Clerk of the House of Representatives

PERRY DEC. EXH. I
PAGE 1 OF 9

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 632, as adopted by the House of Representatives on December 16, 1982.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

Edmund L Henshaw
EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

PERRY DEC. EXH. I
PAGE 2 OF 9

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

PERRY DEC. EXH. I
PAGE 3 OF 9

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 2, as adopted by the House of Representatives on January 5, 1981.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

Edmund L. Henshaw Jr
EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

H. Res. 2

In the House of Representatives, U. S.,

January 5, 1981.

Resolved, That the Senate be informed that a quorum of the House of Representatives has assembled; that Thomas P. O'Neill, Junior, a Representative from the Commonwealth of Massachusetts, has been elected Speaker; and Edmund L. Henshaw, Junior, a citizen of the Commonwealth of Virginia, has been elected Clerk of the House of Representatives of the Ninety-seventh Congress.

Attest:

Edmund L Henshaw

Clerk.

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, as evidenced by the Journal of the House of Representatives, that the following Members constitute the Committee on Public Works and Transportation: James J. Howard, New Jersey (Chairman); Glenn M. Anderson, California; Robert A. Roe, New Jersey; John B. Breaux, Louisiana; Norman Y. Mineta, California; Elliott H. Levitas, Georgia; James L. Oberstar, Minnesota; Henry J. Nowak, New York; Bob Edgar, Pennsylvania; Marilyn Lloyd Bouquard, Tennessee; John G. Fary, Illinois; Robert A. Young, Missouri; Allen E. Ertel, Pennsylvania; Billy Lee Evans, Georgia; Ronnie G. Flippo, Alabama; Nick Joe Rahall II, West Virginia; Douglas Applegate, Ohio; Geraldine A. Ferraro, New York; Eugene V. Atkinson, Pennsylvania; Donald Joseph Albosta, Michigan; William Hill Boner, Tennessee; Ron de Lugo, Virgin Islands; Gus Savage, Illinois; Fofo I. F. Sunia, American Samoa; Buddy Roemer, Louisiana; Wayne Dowdy, Mississippi; Barbara Kennelly, Connecticut; Brian J. Donnelly, Massachusetts; Ray Kogovsek, Colorado; Don H. Clausen, California; Gene Snyder, Kentucky; John Paul Hammerschmidt,

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Arkansas; E. G. Shuster, Pennsylvania; Barry M. Goldwater, Jr., California; Tom Hagedorn, Minnesota; Arlan Stangeland, Minnesota; Newt Gingrich, Georgia; William F. Clinger, Jr., Pennsylvania; Gerald B. Solomon, New York; Harold C. Hollenbeck, New Jersey; H. Joel Deckard, Indiana; Wayne R. Grisham, California; Jim Jeffries, Kansas; Jack Fields, Texas, Guy Molinari, New York; Clay Shaw, Florida; Bob McEwen, Ohio; and Frank Wolf, Virginia.

In witness whereof, I hereby unto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

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PAGE 7 OF 9

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Report No. 97-968.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

Edmund L Henshaw
EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

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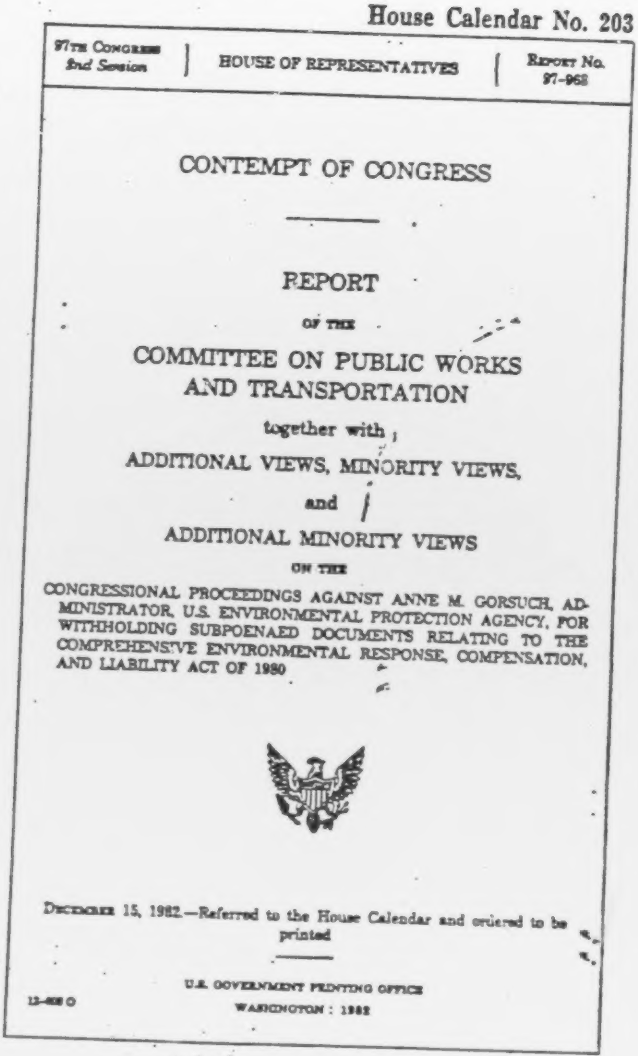
PAGE 8 OF 9



House Calendar No. 203

97th Congress
2nd Session

HOUSE OF REPRESENTATIVES

Report No.
97-968

CONTEMPT OF CONGRESS

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

together with

ADDITIONAL VIEWS, MINORITY VIEWS,

and

ADDITIONAL MINORITY VIEWS

ON THE

CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

December 15, 1982.—Referred to the House Calendar and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
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WASHINGTON : 1982

[REMAINDER OF REPORT DELETED FROM EXHIBIT]

PERRY DEC. EXH. I

PAGE 9 OF 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	Civil Action No. 82-3583

DECLARATION OF STANLEY S. HARRIS

1. I am the United States Attorney for the District of Columbia.

2. At approximately 11:30 p.m. on the evening of December 17, 1982, I received at my home a written communication from the Speaker of the House, Thomas P. O'Neill, a copy of which is attached hereto as Exhibit A. I am informed, believe and therefore aver that the said communication was delivered to me by the Sergeant-at-Arms of the House of Representatives.

3. On December 27, 1982, I sent to Speaker O'Neill a letter, a copy of which is attached hereto as Exhibit B. On or about January 4, 1983, I received from Speaker O'Neill a letter, a copy of which is attached hereto as Exhibit C.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed January 10, 1982.

Stanley S. Harris
STANLEY S. HARRIS

The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw Jr.
Clerk of the House of Representatives

HARRIS DEC. EXH. A
PAGE 1 OF 9

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 632, as adopted by the House of Representatives on December 16, 1982.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

HARRIS DEC. EXH. A

PAGE 3 OF 9

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 2, as adopted by the House of Representatives on January 5, 1981.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

Edmund L Henshaw

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

H. Res. 2

In the House of Representatives, U. S.,

January 5, 1981.

Resolved, That the Senate be informed that a quorum of the House of Representatives has assembled; that Thomas P. O'Neill, Junior, a Representative from the Commonwealth of Massachusetts, has been elected Speaker; and Edmund L. Henshaw, Junior, a citizen of the Commonwealth of Virginia, has been elected Clerk of the House of Representatives of the Ninety-seventh Congress.

Attest:

Edmund L. Henshaw

Clerk.

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, as evidenced by the Journal of the House of Representatives, that the following Members constitute the Committee on Public Works and Transportation: James J. Howard, New Jersey (Chairman); Glenn M. Anderson, California; Robert A. Roe, New Jersey; John B. Breaux, Louisiana; Norman Y. Mineta, California; Elliott H. Levitas, Georgia; James L. Oberstar, Minnesota; Henry J. Nowak, New York; Bob Edgar, Pennsylvania; Marilyn Lloyd Bouquard, Tennessee; John G. Fary, Illinois; Robert A. Young, Missouri; Allen E. Ertel, Pennsylvania; Billy Lee Evans, Georgia; Ronnie G. Flippo, Alabama; Nick Joe Rahall II, West Virginia; Douglas Applegate, Ohio; Geraldine A. Ferraro, New York; Eugene V. Atkinson, Pennsylvania; Donald Joseph Albosta, Michigan; William Hill Boner, Tennessee; Ron de Lugo, Virgin Islands; Gus Savage, Illinois; Fofo I. F. Sunia, American Samoa; Buddy Roemer, Louisiana; Wayne Dowdy, Mississippi; Barbara Kennelly, Connecticut; Brian J. Donnelly, Massachusetts; Ray Kogovsek, Colorado; Don H. Clausen, California; Gene Snyder, Kentucky; John Paul Hammerschmidt, Arkansas; E. G. Shuster, Pennsylvania; Barry M. Goldwater, Jr., California; Tom Hagedorn, Minnesota; Arlan Stangeland, Minnesota; Newt Gingrich, Georgia; William F. Clinger, Jr., Pennsylvania; Gerald B. Solomon, New York; Harold C. Hollenbeck, New Jersey; H. Joel Deckard, Indiana; Wayne R. Grisham, California; Jim Jeffries, Kansas; Jack Fields, Texas, Guy Molinari, New York; Clay Shaw, Florida; Bob McEwen, Ohio; and Frank Wolf, Virginia.

In witness whereof, I hereby unto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Report No. 97-968.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

HARRIS DEC. EXH. A
PAGE 8 OF 9

House Calendar No. 203

97TH CONGRESS *2nd Session*	HOUSE OF REPRESENTATIVES	REPORT No. 97-968

CONTEMPT OF CONGRESS

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

together with

ADDITIONAL VIEWS, MINORITY VIEWS,

and

ADDITIONAL MINORITY VIEWS

ON THE

CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

DECEMBER 15, 1982.—Referred to the House Calendar and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE
13-408 O WASHINGTON : 1982

[REMAINDER OF REPORT DELETED FROM EXHIBIT]

HARRIS DEC. EXH. A

United States Attorney
District of Columbia

United States Courthouse, Room 2800
Constitution Avenue and 3rd Street N.W.
Washington, D.C. 20001

December 27, 1982

The Honorable Thomas P. O'Neill, Jr.
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This is in response to your communication of December 17, 1982, certifying to me House Resolution 632 regarding the production of documents by The Honorable Anne M. Gorsuch, Administrator of the United States Environmental Protection Agency.

On December 16, 1982, Civil Action Number 82-3583 was filed by the Department of Justice in the United States District Court for the District of Columbia. In that case, the Department seeks to have the District Court declare that the compelled production of the documents sought by the House of Representatives unconstitutionally would contravene important separation of powers principles, and that the subpoena issued for those documents is constitutionally defective. Pursuant to Section 547 of Title 28, United States Code, I am responsible within this district for prosecuting, for the Government, all civil actions, suits, or proceedings in which the United States is concerned. Accordingly, although the principal work in the pending case is being done by the Civil Division of the Department of Justice, I nonetheless am in the posture of being legally responsible for the prosecution of that civil action for the Government.

Under the same statutory section, I also am responsible for prosecuting, within this district, all offenses against the United States. As part of the discretion which I must exercise as the chief prosecuting officer of this district, a determination must be made as to when a matter should be submitted to a grand jury.

I am keenly aware of the provisions of Section 194 of Title 2, United States Code. It should be noted that that section of the Code quite properly does not include a mandate as to the timing of submitting a matter to a grand jury.

RECEIVED
DEC 27 1982
Assistant Attorney General
[illegible]

HARRIS DEC. EXH. B
PAGE 1 OF 2

I recognize the degree of interest which you and your colleagues have in this proceeding. Accordingly, as a matter of courtesy I wish to advise you that I have concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved. While I recognize the likelihood that we are in disagreement over the underlying merits of the controversy, we do have a common interest -- namely, achieving a resolution of the disputed questions as expeditiously as possible and with a minimum of adverse consequences to good government and to the country as a whole. Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.

You may be assured of my continuing and careful attention to this matter.

Respectfully,

Stanley S. Harris

STANLEY S. HARRIS
United States Attorney
District of Columbia

SSH:zm

Copy: Hon. Edmund L. Henshaw, Jr.
Clerk of the House of Representatives

Hon. J. Paul McGrath
Assistant Attorney General
Civil Division
Department of Justice

HARRIS DEC. EXH. B
PAGE 2 OF 2

The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

RECEIVED
JAN 5 1983
Assistant Attorney General
Civil Division

January 4, 1983

Mr. Stanley S. Harris
United States Attorney
United States Department
of Justice
2800 United States Courthouse
Constitution Avenue and
3rd Street, N.W.
Washington, D.C. 20001

Dear Mr. Harris:

This responds to your December 27, 1982 letter concerning the congressional contempt citation of Anne M. Gorsuch, Administrator of the Environmental Protection Agency.

While concluding "that it would not be appropriate . . . to consider bringing the matter before a grand jury until the civil action has been resolved" you stated that you are also "keenly aware of the provisions of Section 194 of Title 2 United States Code."

You are therefore aware that Section 194 provides that the Speaker shall certify the statements of facts "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." As more fully set forth in the memorandum of points and authorities filed with the House Motion To Dismiss the Complaint, a copy of which was provided to you, it is the position of the House of Representatives that there is no legal basis for the civil suit and it neither precludes your office from discharging your responsibilities under law, nor affects in any way the validity of the statute.

Sincerely,

Thomas P. O'Neill
Thomas P. O'Neill, Jr.
Speaker

cc: Honorable Peter W. Rodino, Jr.
Honorable Elliott H. Levitas
Honorable James J. Howard

HARRIS DEC. EXH. C

PAGE 1 OF 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al*.,)
)
)
Plaintiffs,)
)
v.) Civil Action No.
)
THE HOUSE OF REPRESENTATIVES OF) 82-3583
THE UNITED STATES, *et al*.,)
)
Defendants.)
)

DECLARATION OF CAROL E. DINKINS

I, Carol E. Dinkins, hereby declare as follows:

1. I am the Assistant Attorney General for the Land and Natural Resources Division ("the Division") of the United States Department of Justice ("the Department").

2. I have responsibility for conducting civil and criminal litigation which involves air, water, noise and other types of pollution and to which the United States or an officer or agency thereof is a party or is interested. 28 U.C.S. §§515(a) and 516; 28 C.F.R. §0.65. That responsibility includes the conduct of litigation arising under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601 *et seq*., commonly known as the Superfund Act. 42 U.S.C §9615; Executive Order 12316 (August 14, 1981), Section 8.

3. The Division is subdivided into discrete sections, each of which is responsible for a portion of the overall litigation conducted by the Division. Responsibility for the conduct of Superfund

Act and other environmental enforcement litigation generated by the United States Environmental Protection Agency ("EPA") is vested in the Environmental Enforcement Section. This section is comprised of staff attorneys and associated support personnel under the direction of a Chief, Stephen D. Ramsey, and three Assistant Chiefs.

4. Mary L. Walker is the Deputy Assistant Attorney General of the Division. She is an appointee of the Attorney General, who, subject to my supervision and direction, supervises the Chief of the Environmental Enforcement Section. She is responsible for providing and implementing policy direction and overall supervision to the Environmental Enforcement Section and the other sections for which she is responsible. She is one of three Deputy Assistant Attorneys General within the Division.

5. EPA and the Department have developed a system for case investigation, development and prosecution that is followed with respect to Superfund Act litigation. EPA is responsible for the initial identification and investigation of matters for potential judicial or administrative enforcement proceedings. The Department participates at an early stage in case development, first informally through regular meetings with EPA attorneys and technical personnel, and then later in a formal way after cases are referred to the Department with requests for the initiation of civil or criminal litigation. Both stages of the "case development process" are part of the overall process of enforcing the Superfund Act. Thus, whether a case has been formally referred

to the Department for litigation is not determinative of its status as an enforcement matter. Indeed, EPA frequently negotiates with potential defendants in an attempt to settle matters prior to the commencement of formal judicial proceedings and considers such matters to be enforcement cases at that stage.

6. In the course of the case development process both before and after a case is formally referred to the Department, there is regular contact and discussion among technical personnel, EPA attorneys and Department personnel concerning evidence, legal issues, plans, strategy and other matters involved in the preparation of the case for litigation. These exchanges are necessarily candid and frank in their evaluation of the strength and weakness of the Government's position in negotiation or litigation. The disclosure of information concerning such matters could provide defendants and potential defendants with candid insights into the strengths and weaknesses of the Government's position, the Government's plans (for example, likelihood of prosecution), the Government's strategy for negotiation and/or litigation, and other confidences which are normally subject to work product, deliberative or attorney-client privileges. The disclosure of such information could thus be of distinct value to such persons in evaluating their posture in negotiation or litigation with the Government. Disclosure of such information could, and most likely would, adversely impact the ability of the Government to prosecute Superfund Act enforcement cases effectively. Moreover, although some of such information might normally be disclosable after the passage of time, premature disclosure could have the same adverse impact.

7. In the course of my duties as Assistant Attorney General of the Land and Natural Resources Division, I was advised by officials of EPA and by Ms. Walker and Mr. Ramsey that documents which had been prepared in anticipation of or in the process of ongoing enforcement proceedings were being sought for examination by subcommittees of Congress. I was advised by both my professional staff and EPA staff that the revelation or disclosure of the information contained in some of the documents which had been requested by the congressional subcommittees could or would adversely affect the ability of the Government to effectively and successfully carry out its responsibilities with respect to enforcement matters under the Superfund Act.

8. In order to determine whether the disclosure of specific documents identified by EPA could or would have such adverse impact, I instituted a procedure for review of the documents in question by personnel within the Division. Copies of those documents were transmitted to the Division, where they were reviewed in the first instance by Mr. Ramsey with the assistance of his professional staff to determine whether disclosure of them would adversely affect the ability of the Government to conduct Superfund Act enforcement matters effectively. After Mr. Ramsey completed his review and made his recommendation to Ms. Walker, Ms. Walker reviewed the documents using the same standard. Thereafter, I reviewed the documents and considered the collective recommendation of Ms. Walker and Mr. Ramsey.

9. We determined that disclosure of certain documents, which are identified in Exhibit G to the Declaration of Robert M. Perry, would reveal governmental litigation and negotiation plans,

evidence, analyses, strategy, mental impressions, thought processes and other information which would not, absent extraordinary circumstances, be available to adverse parties prior to or in the course of litigation. It was our unanimous professional opinion that disclosure of those documents, or of the information contained in them, to adverse parties would give them a substantial advantage in negotiation and litigation with the Government and potentially damage the overall enforcement effort of the Government under the Superfund Act. We specifically concluded that their disclosure would adversely impact the ability of the EPA and the Department to effectively negotiate or litigate Superfund Act enforcement actions against such parties.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on January 10, 1983 in Washington, D. C.

Carol E. Dinkins

CAROL E. DINKINS

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1983, I served the foregoing Motion for Summary Judgment, Points and Authorities in Support Thereof and In Opposition to Defendants' Motion to Dismiss, Motion for Leave to Amend the Complaint and Join the Sergeant-at-Arms as a Party Defendant, Second Amended Complaint, and Motion for Leave to File Points and Authorities in Excess of the Page Limitation of Local Rule 1-9(e) by delivering a copy by hand to:

Stanley M. Brand
General Counsel to the Clerk
Office of the Clerk
U.S. House of Representatives
H-105, The Capitol
Washington, D.C. 20515

Betsy J. Grey
BETSY J. GREY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	Civil Action No. 82-3583 (Smith, J.)

MOTION OF THE HOUSE OF REPRESENTATIVES TO DISMISS AND TO EXPEDITE CONSIDERATION

The United States House of Representatives, Honorable Thomas P. O'Neill, Jr., Speaker, the Honorable James Howard, Chairman of the Committee on Public Works & Transportation and the Honorable Elliott Levitas, Chairman of its Subcommittee on Oversight and Investigations; the Honorable Edmund L. Henshaw, Jr., Clerk, the Honorable Benjamin J. Guthrie, Sergeant-at-Arms, and the Honorable James F. Molloy, through their undersigned counsel, hereby move the Court to dismiss the complaint against them in the above-captioned action pursuant to Rule 12(b), Federal Rules of Civil Procedure and state as grounds for the motion that the court lacks jurisdiction over the subject matter and over the person in that the defendants are protected from suit by virtue of the Speech or Debate Clause, Rule 12(b)(1) and (2), Fed.R.Civ.P.; that the court has no statutory jurisdiction to hear the case; and that the action does not present a case or controversy under Article III of the Constitution. *Id*. In addition, defendants submit that the complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6), Fed.R.Civ.P.

Based on the foregoing, defendants submit that the complaint should be dismissed forthwith.

In addition, pursuant to Rule 57, Fed.R.Civ.P., the defendants request that the hearing and consideration of this motion be advanced on the Court's calendar and that the Court consider and rule on the jurisdictional defenses raised herein before proceeding to consider any other motion or matters incident to this action. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975).

In support of the motion, we respectfully refer the Court to the memorandum of points and authorities filed herewith.

Respectfully submitted,

Stanley M. Brand
Stanley M. Brand
General Counsel to the Clerk

R Ross
Steven R. Ross
Deputy Counsel to the Clerk

Michael L. Murray
Michael L. Murray
Assistant Counsel to the Clerk

Office of the Clerk
U.S. House of Representatives
H-105, The Capitol
Washington, D.C. 20515
(202) 225-7000

Attorneys for the House of
Representatives

Of Counsel:

Eugene Gressman
Special Counsel
140 West 62nd Street
New York, New York 10023

L. Kirk O'Donnell
General Counsel to the Speaker
U.S. House of Representatives
Washington, D.C. 20515

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE HOUSE OF REPRESENTATIVES
OF THE UNITED STATES, et al.,

Defendants.

Civil Action No. 82-3583
(Smith, J.)

HOUSE OF REPRESENTATIVES MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Stanley M. Brand
General Counsel to the Clerk

Steven R. Ross
Deputy Counsel to the Clerk

Michael L. Murray
Assistant Counsel to the Clerk

Office of the Clerk
U.S. House of Representatives
H-105, The Capitol
Washington, D.C. 20515
(202) 225-7000

Attorneys for the House of
Representatives

Of Counsel:

Eugene Gressman
Special Counsel
140 West 62nd Street
New York, New York 10023

L. Kirk O'Donnell
General Counsel to the Speaker
U.S. House of Representatives

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	Civil Action No. 82-3583 (Smith, J.)

HOUSE OF REPRESENTATIVES MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Preliminary Statement

On two levels, this case is an unprecedented and historic first. On the surface level of the complaint, it is the first attack on the constitutional, legislative actions of the United States House of Representatives in a federal court proceeding "brought in the name of the United States as sovereign," United States v. Nixon, 418 U.S. 683, 694 (1974). This is a suit, in other words, instituted on behalf of "the United States as the sovereign composed of three branches," Id. at 696, against a constituent part of one of those three coordinate branches. As such, the suit collides with "the established principle that a person cannot create a justiciable controversy against himself." United States v. ICC, 337 U.S. 426, 431 (1949).

But, as the Court observed in the ICC case, 337 U.S. at 430, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." It is at that below-the-surface level that this case can be seen as the first instance in which the Executive Branch, or certain officers thereof, seek the aid of the federal judiciary to be excused from either the application or performance of federal statutes that the Executive Branch is sworn to obey and execute. It is also the first modern instance in which the Executive Branch seeks invalidation of a statute on an advisory basis, prior to its enforcement or application.

This lawsuit offends so many established principles of federal jurisdiction and Article III justiciability, and so totally fails to allege a cognizable cause of action, as to warrant dismissal of the complaint forthwith.

The House has included in its motion to dismiss two procedural prayers which we believe necessitate immediate action: (1) the court should expedite the briefing and consideration of the motion to dismiss; and (2) because of the serious and fatal jurisdictional flaws in the complaint, resolve those threshold issues first without proceeding to consider any other issues on the merits.

I. INTRODUCTION

A. The Contempt Citation

On December 16, 1982 the House of Representatives considered and passed by a vote of 259 yeas to 105 nays, H.R. Res. 632, 128 Cong. Rec. H10061 (daily ed. Dec. 16, 1982) (attached as Exhibit 1), citing the Administrator of the Environmental Protection Agency, Anne M. Gorsuch who was subpoenaed as a witness before a duly constituted committee of the House and failed to produce certain documents, for contempt of Congress pursuant to statute. 2 U.S.C. §192 _et seq_. The proceedings in the House were conducted under rules providing that "[q]uestions of privilege [of the House]. . .affecting the rights of the House collectively, its safety and dignity and the integrity of its proceedings . . .shall have precedence of all other questions. . ." H.R. Rule IX, Rules of the House of Representatives §661, _reprinted in_ Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 398, 96th Cong., 2d Sess. 317 (1981). (A copy of the rule is attached as Exhibit 2).

The contempt resolution was accompanied by a committee report outlining in detail the events which preceded the finding of contempt by the House Committee on Public Works for non-compliance with a subpoena issued by its Subcommittee on Investigations and Oversight and served on November 22, 1982. _Contempt of Congress: Report of the House Committee on Public Works and Transportation on the_

Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, For Withholding Subpoenaed Documents Relating To The Comprehensive Environmental Response, Compensation and Liability Act of 1980, H.R. Rep. No. 968, 97th Cong., 2d Sess. 1 (1982).

The recommendation to cite the Administrator for contempt was approved by the Committee on December 10, 1982 and the report, together with additional and minority views, was filed on December 15, 1982. 128 Cong. Rec. H9910 (daily ed. Dec. 15, 1982)

The subpoena was issued to obtain relevant information within EPA relating to the EPA's administration of the so-called "Superfund" law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub.L.No. 96-510, codified at 42 U.S.C. §9604 (Supp. V 1981), the purpose of which was to provide for the clean-up of abandoned hazardous waste sites through the establishment of a $1.6 billion trust fund and an enforcement mechanism for recovery of the costs of clean-up against the party responsible for creating the waste site. As the legislative history indicates, the legislation was adopted to provide "for a comprehensive scheme to provide for recovery of damages caused by oil spills, recovery of cleanup costs and establishment of liability and requirements for financial responsibility." H.R. Rep. No. 172, 96th Cong., 2d Sess. 2 (1980).

The investigation by the Subcommittee on Investigations and Oversight was commenced to determine whether the Environmental Protection Agency, charged with administering Superfund, is properly and vigorously enforcing the law, particularly with respect to obtaining or recovering the full costs of cleaning up abandoned hazardous waste dumps from the companies that are responsible.

The vote to cite the Administrator for contempt commenced at approximately 9:40 p.m., December 16, 1982, and was concluded at roughly 10:00 p.m. 128 Cong. Rec. H10061 (daily ed. Dec. 16, 1982) (Exhibit 1). Only moments later, and before the Speaker of the House had actually certified the resolution of contempt to the United States attorney for presentment to the grand jury, the Department of Justice filed the instant action seeking to enjoin and restrain the legislative defendants from taking any further action to enforce the subpoena and to declare the subpoena unconstitutional. 1/

Service of the complaint was not effected until the following day and no attempt was made to notify or serve the summons and complaint upon the House or any of its named officers, even though the House did not adjourn until 12:31 a.m., December 17, 1982, 128 Cong. Rec. D1456 (daily ed. Dec. 16, 1982), and its officers were present during the

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1/ The Speaker certified the contempt on the following day and it was delivered to the United States Attorney at 11:15 on December 17, 1982. 128 Cong. Rec. H10268 (daily ed. Dec. 17, 1982) (Exhibit 3).

session attending to the business of the House until adjournment to receive service had any effort to do so been made.

B. The Complaint

The complaint identifies the sole plaintiff as the sovereign "United States of America," described as residing at the following address: "c/o U.S. Department of Justice, 9th & Pennsylvania Ave., N.W., Washington, D.C. 20530." See Local Rule 1-5(b).

Jurisdiction is alleged to exist under two statutes, 28 U.S.C. §§1331, 1345. The complaint seeks declaratory relief under, but does not cite, the Declaratory Judgment Act. But that Act provides only remedies, not jurisdiction. Skelly Oil Co. v. Philips Petroleum Co., 339 U.S. 667, 671 (1950).

We vigorously contest, as shown below, the authority of the Attorney General or any other Executive official, to bring suit in the name of the sovereign against the Legislative branch, and therefore, refer throughout to "plaintiff" to signify the party or parties in interest bringing suit, whoever they may be.

The complaint names the "House of Representatives;" the "Committee on Public Works and Transportation;" the "Subcommittee on Investigations and Oversight;" the Honorable Elliott Levitas, Chairman of the Subcommittee, the Honorable James Howard, Chairman of the full Committee and the Honorable Thomas P. O'Neill, Jr., the Speaker of the

House, and the other elected House officers: the Honorable Edmund L. Henshaw, Clerk, the Honorable Benjamin J. Guthrie, Sergeant-at-Arms, and the Honorable James Molloy, Doorkeeper. [2]

As explained in the complaint, "[t]his is a civil action seeking a declaratory judgment and injunctive relief on the grounds that efforts to compel production of the documents discussed below are unconstitutional because the dissemination of such documents, which are part of open investigatory law enforcement files and deliberative decision making materials, outside of the Executive Branch would impair the President's constitutional obligation to ensure that the laws be faithfully executed. United States Constitution, Art. II, Sec. 1. See United States v. Nixon, 418 U.S. 683, 711 (1974)." Complaint ¶13. The Complaint further alleges that subpoena is "defective because it is overbroad," Complaint ¶39, and that Administrator Gorsuch cannot be subject to a criminal prosecution under 2 U.S.C. §194 because she "has been instructed by the President to withhold such privileged documents from . . . the Congress . . .." Complaint ¶41.

Finally, the Complaint seeks declaratory and injunctive relief, including restraint against the legislative defendants from taking further action to enforce the subpoena; that 2 U.S.C. §194 cannot be invoked against an executive official and that the subpoena "is unconstitutional on its face and as applied." Complaint, Prayer for Relief, ¶D.

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[2] The complaint does not name the Chaplain or the Postmaster, the two remaining elected constitutional House officers. See, U.S. Const., art. I, §2, cl. 5; H.R. Rule II, Rules of the House, supra §635 at 305; Buckley v. Valeo, 424 U.S. 1, 128 (1976).

The summons served upon the House of Representatives and its Member and officer defendants purports to require a response by way of motions or answer within 20 days after service. Pursuant to Rule 12(a), Fed.R.Civ.P., the United States or an officer or agency thereof is entitled to 60 days after service within which to respond. Apparently, the Department believes that while the law provides 60 days, for example, to members of local draft boards, Totus v. United States, 39 F.Supp. 7 (E.D. Wash. 1941) and to agencies performing governmental service like the Tennessee Valley Authority, Ramsey v. United Mine Workers, 27 F.R.D. 423, 425 (E.D. Tenn. 1961), the House of Representatives, as a component of the United States, is not entitled to 60 days. The House, its officers and members have been customarily afforded the 60 day time limit in recognition of their self-evident status as "officers" for purposes of Rule 12(a), Sharrow v. Holtzman, Civ. Action No. 78-C-2407, (E.D.N.Y. issued March 26, 1979) slip op. at 2 n.1 (unpublished opinion) aff'd 643 F.2d 1292 (2d Cir. 1979) cert. denied 452 U.S. 939 (1981), and the Department itself has routinely claimed the 60 day limit in representing Members, officers and employees sued in their official capacity. The House of Representatives desires prompt dismissal of this suit and so we have filed the motion to dismiss as expeditiously as possible. The prompt filing of the motion to dismiss should not be construed to mean agreement with or acquiescence in the Department's assertion that the House and its Member and officers are entitled only to the 20 days afforded private parties. [3]

C. Subsequent Events

Following the late night filing of the complaint, the Department of Justice announced its intention not to take the steps mandated by the criminal contempt statute, despite the nondiscretionary nature of the obligation imposed upon the United States Attorney to present the matter to the grand jury. 2 U.S.C. §194. In Re Frankfeld, 32 F.Supp. 915 (D.D.C. 1940).

Instead, the Department of Justice, at a press conference held the following day, announced the filing of this suit "seeking to block the contempt action" and "to enjoin any effort to pursue the criminal action against

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[3] The court might be aware that the summons filed by the former Senate Select Committee on Presidential Campaign Activities, the so called "Watergate Committee", provided then President Nixon the normal 60 days, however, the Committee moved to reduce the time the same day it filed the Complaint to 20 days. Prior to any action by the district court on the motion, the parties stipulated to a reduction of time to answer or respond to 20 days. The motions and stipulation are reprinted in Presidential Campaign Activities of 1972, Appendix to the Hearings of the Senate Select Comm. on Presidential Campaign Activities: Legal Documents Relating to the Select Committee Hearings, 93d, Cong., 1st and 2d Sess., Part I, 541, 637-643 (1974) (hereinafter "Senate Select Committee Legal Documents").

Gorsuch." Department of Justice Statement, p.1 (attached as Exhibit 4).

Unattributed Department spokesmen stated: "It would be a terrible dereliction of office to prosecute under [the] circumstances." Wall St. J., Dec. 20, 1982, at 6, col. 1.

On December 17, 1982 at 11:15 p.m., the Speaker's certification was delivered to the United States Attorney for the District of Columbia, and notification of delivery was presented to the House at approximately 1:00 a.m. on Saturday morning December 17, 1982 while the House was in session. 128 Cong. Rec. H10268 (daily ed. Dec. 17, 1982) (attached as Exhibit 3).

II. INJUNCTIVE AND DECLARATORY RELIEF ARE INAPPROPRIATE

A. The Speech or Debate Clause Bars The Request For Injunctive And Declaratory Relief

The instant Complaint seeks "injunctive relief on the ground that efforts to compel production of the documents discussed below are unconstitutional. . ." Complaint ¶13, and states that because "there is no legal basis for the House of Representatives to serve upon the United States Attorney a request for criminal prosecution under the provisions of 2 U.S.C. §194. . .the ["plaintiff"] has no adequate remedy at law. . .[and] is entitled to an injunction to prevent such action," Complaint ¶s 41, 42, and

43. [4] In addition, the prayer for relief requests the court to "enjoin and restrain defendants from taking any further action to enforce the outstanding subpoena served by the Committee on Public Works and Transportation. . ." Complaint, Count II, ¶A.

The Speech or Debate Clause prevents Members not only from being "questioned" in court for actions performed in the chamber in terms of either testifying, McSurely v. McClellan, 553 F.2d 1277, 1299 (D.C. Cir. 1976) (en banc) cert. dismissed as improvidently granted, 438 U.S. 189 (1978); Gravel v. United States, 408 U.S. 606, 616 (1972), or in terms of liability, Doe v. McMillan, 412 U.S. 306 (1973), but even from "the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

The Speech or Debate Clause is the paradigmatic manifestation of the separation of powers, Davis v. Passman, 442 U.S. 228, 235 n.11 (1979), designed to "preserve the constitutional structure of separate, coequal and independent branches of government." United States v. Helstoski, 442 U.S. 477, 491 (1979). It protects "Member's conduct at legislative committee hearings," Gravel v. United States, 408 U.S. at 624, on the floor, Kilbourn v. Thompson, 103 U.S. 168, 200 (1882), and before other officially convened groups of legislators. Vander Jagt v. O'Neill, 524 F.Supp. 519 (D.D.C. 1981), aff'd. No. 81-1722 (D.C. Cir. Dec. 23, 1982).

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[4] At this point, as far as the House of Representatives, its Members or officers are concerned, there is nothing further to prevent since all action which can be taken in the House has been completed. The Department of Justice must understand, having prosecuted hundreds of prior cases under the statute, see generally, Sky, Judicial Review of Congressional Investigations: Is There An Alternative To Contempt?, 31 Geo.Wash.L.Rev. 399 (1962) that once certification is effected by the Speaker, no further action lies within or is necessary by the House. Although no full Committee or floor action had been taken before adjournment sine die of the 97th Congress with regard to a similar subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the complaint is drawn to include that committee's subpoena. Complaint ¶s 20, 31, 35, 36. Accordingly, the action could be read to seek injunction of ongoing legislative activity of another committee.

The "plaintiff's" complaint makes no pretense in alleging anything but "pure" legislative acts taken in the chamber and in committee in relation to the issuance of a subpoena. See, e.g., Complaint ¶26 (subcommittee vote); ¶27 (full committee vote); ¶31 (service of subpoena by subcommittee of the Committee on Energy and Commerce), and ¶35 (subcommittee vote). It is beyond doubt that voting, reporting and debating or anything done in the chamber or committee cannot serve as a basis for suit. United States v. Brewster, 408 U.S. 501, 527 (1972) (a court cannot inquire into how a legislator "spoke, how he debated, how he voted, or anything he did in the chamber or in committee").

Members and staff are acting within the legislative sphere when conducting investigations, Tavoulareas v. Piro, 93 F.R.D. 11, 18 (D.D.C. 1981); 527 F.Supp. 676, 682 (D.D.C. 1981), and when authorizing or preparing subpoenas, McSurely v. McClellan, 521 F.2d 1024, 1037 (D.C. Cir. 1975) aff'd en banc by an equally divided court, 553 F.2d 1277, 1284

(1976); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975). The "plaintiff" avers the power to perform, and the actual performance of, these very legislative acts in the action. See, e.g., Complaint ¶s 4-5 (Committee on Public Works and Transportation has power to issue subpoenas and to vote to cite a witness for contempt); Complaint ¶21 (service of subpoena); Complaint ¶27 (committee voted to cite Administrator for contempt); and Complaint ¶28 (House passed a resolution).

Once it is determined that Member's are acting within the legislative sphere, as clearly they are when voting or debating on a contempt resolution, Kilbourn v. Thompson, 103 U.. 168, 200 (1882) judicial inquiry is at an end and "the Speech or Debate Clause is an absolute bar to judicial interference." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975) (emphasis added).

As to non-legislator defendants, they are also immunized when performing acts within the legislative sphere either delegated to them by constitutional rule-making authority, Consumers Union of the United States, Inc. v. Periodical Press Correspondents' Ass'n., 515 F.2d 1341, 1343 (D.C. Cir. 1975), cert. denied 423 U.S. 1051 (1976). (legislative functionaries supervising seating in press galleries "performing delegated legislative functions. . .[which] were an integral part of the legislative machinery"), or which if performed by Members themselves would be immune. Gravel v. United States, 408

U.S. at 618. And the non-legislator agents are liable only for carrying into execution an unconstitutional order of the House outside the House of Representatives but not for acts which "if performed in other than legislative contexts, would in [themselves] be unconstitutional or otherwise contrary to criminal or civil statutes." Doe v. McMillan, 412 U.S. at 312-13. Kilbourn, supra at 200 (Members immune for debating, reporting and adopting resolution to arrest contumacious witness; sergeant-at-arms liable for false imprisonment in executing warrant where there was no valid legislative inquiry); Powell v. McCormack, 395 U.S. 484, 505 (1969) (Members immune for voting to exclude Representative elect; officers subject to declaratory relief for refusing to accord Representative elect rights and emoluments of office); Eastland v. United States Servicemen's Fund, supra (Members and staff immune for issuance of subpoenas which infringed First Amendment rights of plaintiffs); Doe v. McMillan, supra (Member and committee consultant immune for authorizing and preparing allegedly libelous report; remanded for determination whether public printer's actions exceeded legitimate legislative bounds). [5]

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[5] Here it is unnecessary to even consider whether legislative functionaries could be subject to "coercive relief," for no House officer is required to do anything under the contempt statute. Powell v. McCormack, 395 U.S. 486, 514-515 (1969). It is the House which votes and the Speaker who certifies, 2 U.S.C. §194, and no officer is charged with any responsibility in either regard. The "plaintiff" has either named the officers in total disregard for the plain words of the statute, which do not implicate them, or in a transparent attempt to save the complaint from dismissal by naming non-legislator agents. The officers are simply not proper party defendants and cannot save an otherwise infirm complaint from dismissal.

The act of certification by the Speaker and its delivery to the United States attorney is intimately cognate to the vote and debate on the resolution of contempt; it is a legislative act by the narrowest definition because it forms "an integral part of the deliberative and communicative processes by which Members participate in. . .House proceedings with respect. . .to. . .matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. at 625. The Speaker, and Clerk of the House, regularly and by rule certify all bills and resolutions which pass the House and the certification of contempt is therefore, something "generally done in a session of the House by one of its members in relation to the business before it." Kilbourn v. Thompson, 703 U.S. at 204. See also H.R. Rule I, Rules of the House of Representatives, supra §624 (Speaker is authorized to sign enrolled bills whether or not the House is in session) and H.R. Rule III, id. §643 (Clerk to certify passage of all bills and joint resolutions).

Eastland also makes it abundantly clear that neither injunctive nor declaratory relief can lie against legislators and their aides in view of the absolute nature of the clause. 421 U.S. at 507.

In Eastland, plaintiffs sued the Chairman and nine Members of the Senate Subcommittee and its Chief Counsel for issuing and serving a subpoena upon a bank for plaintiff's records in alleged violation of the organization's First

Amendment associational and free speech rights. In a complaint remarkably similar to the "plaintiff's" action here,

> . . .USSF and its members. . .sought a permanent injunction restraining the Members of the Subcommittee and its Chief Counsel from trying to enforce the subpoena by contempt of Congress and other means and restraining the bank from complying with the subpoena. Respondents also sought a declaratory judgment declaring the subpoenas and the Senate resolutions void under the Constitution.

421 U.S. at 496.

The court of appeals stayed enforcement of the subpoenas pending consideration of the claims by the district court, id. n.9, and later during court of appeals consideration, id. n.10, and held that "although courts should hesitate to interfere with congressional actions even where First Amendment rights are clearly implicated, such restraint could not preclude judicial relief where no alternative avenue of relief is available other than 'through the equitable powers of the court.'" Id. at 497 quoting Eastland v. United States Servicemen's Fund, 488 F.2d 1252, 1259 (D.C. Cir. 1973).

The Supreme Court reversed, rejecting the power of the courts to enjoin implementation of the subpoenas on the "theory. . .that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights." Id. at 409. The Court rejected as well the "clear implication. . .that the District Court was authorized to enter a 'coercive order' which in context would mean that the Subcommittee would be prevented from pursuing its inquiry by use of a subpoena to the bank." 421 U.S. at 500. Accordingly, the Court remanded with instructions to dismiss the complaint in its entirety. Id. at 512.

Similarly, in Doe v. McMillan, supra, public school children and their parents brought an action against Members of the District of Columbia committee to prevent publication by Congress of a committee report, which included derogatory information on absenteeism and disciplinary problems. The plaintiffs' "complaint prayed for an order enjoining the defendants from further publication, dissemination, and distribution of any report containing the objectionable material and for an order recalling the reports to the extent practicable and deleting the objectionable material from the reports already in circulation." Doe v. McMillan, 412 U.S. at 304-305.

The Court affirmed dismissal of the complaint on Speech or Debate Clause grounds "insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included material to the Speaker of the House and for voting for publication of the report." 412 U.S. at 312.

Furthermore, because the defendant legislators did no "more than conduct the hearings, prepare the report and authorize its publication," id. at 312, they were not subject to suit, and here the defendant legislators did no more than report and vote the privileged resolution of contempt and have the Speaker certify it to the United States Attorney. [6]

The court of appeals had declined to enter any injunctive relief because the Public Printer agreed not to seek republication or distribution beyond the internal needs of Congress, 459 F.2d 1304, 1315 (D.C. Cir. 1972), and the "plaintiff" is in no better position in this case to demonstrate the irreparable injury which would entitle it to injunctive relief because like the plaintiff in Doe, the "plaintiff" cannot show any "current activity by [Congress] which constitute[s]. . .an actual threat along such lines, or which otherwise give immediacy to the claim that constitutional freedoms are being infringed or jeopardized." Doe v. McMillan, 459 F.2d at 1316 quoting Cole v. McClellan, 439 F.2d 534, 536 (D.C. Cir. 1970). [7]

Of particular relevance to the facts alleged in the complaint is the court of appeals statement on remand affirming the District Courts' entry of judgment for defendants on speech or debate grounds that, "Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable." Doe v. McMillan, 566 F.2d 713, 718 (D.C. Cir. 1977).

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[6] The House has certified hundreds of contempts to the United States Attorney for prosecution. During the period 1945-1957 the House alone referred over 100 contempt citations to the Department for prosecution. C. Beck, Contempt of Congress 14 (1959). We are unaware of the Department ever having raised the constitutionality of the statute on its face or as applied in any of these cases.

[7] This point vividly illustrates the patent absurdity presented by the "plaintiff's" complaint. It seeks nothing less than the exercise of the Court's equitable powers against itself and presumably, the United States Attorney.

The evolution of this Circuit's decisions on the inappropriateness of coercive relief against legislators in light of the Supreme Court's pronouncement in Eastland can be seen by contrasting the Circuit's opinion upholding the preliminary injunction in Eastland with Judge Leventhal's later statement in United States v. American Telephone & Telegraph, 567 F.2d 121, 129 (D.C. Cir. 1977) that: "The fact that the Executive is not in a position to assert its claim of constitutional right by refusing to comply with a subpoena [because the documents were in the possession of AT&T] does not bar the challenge so long as members of the subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena." (emphasis added). Of course in the instant suit all the defendants are legislative entities and the "plaintiff" is seeking precisely what Judge Leventhal understood would be precluded by Eastland.

The "plaintiff's" complaint, filed by the Department of Justice, is diametrically opposite to its position in other cases, where it is defending the very legislative acts it now attacks. Only last month the Department asserted, on behalf of the "United States" and the House that the Clause is an absolute bar to suit against the House and Senate and its officers in a suit challenging the enactment of the "Tax-Equity and Fiscal Responsibility Act of 1982," Pub.L.No. 97-248, 96 Stat. 324 (Sept. 3, 1982). There plaintiffs filed an action for injunctive and declaratory relief, before the bill which ultimately became law passed the House and was signed by the President. In defense of the suit the Department asserted that the clause was an absolute bar to maintaining suit against "officers and officials of the House and Senate as well as the institutions themselves." Memorandum In Support of Motion To Dismiss By United States and Senate Defendants at 18, W. Henson Moore v. United States House of Representatives, and Ron Paul v. United States, Consolidated Civ. Action Nos. 82-2318, 82-2352 (D.D.C.) [8]

The Department's memorandum unabashedly proclaimed that the "amendment of a bill by the Senate, the tabling of a proposed resolution by the House, and the signing of the bill by the Speaker of the House and the President of the Senate, is by any definition 'legitimate legislative activity' protected by the speech or debate clause." Id. at 19. The Department also argued that the act of certifying, the very same act in question in this case, by the Clerk of the House "is certainly conduct related to the functioning of Congress itself, and thus within the protection of the Clause." Id. [9]

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[8] The suit was dismissed by Judge Joyce Hens Green in a Memorandum Opinion issued on December 16, 1982, on the grounds that plaintiffs lacked standing to sue and upon the basis of the doctrine equitable discretion announced in Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981).

In summary, the Speech or Debate Clause absolutely bars injunctive or declaratory relief against the House of Representatives or its Members in this case.

B. Under These Circumstances Federal Courts Will Not Interfere By Way Of Declaratory Or Injunctive Relief In Criminal Prosecutions

Presaging the denial of both injunctive and declaratory relief in Eastland were a series of cases in this circuit denying exercise of the district court's equity powers to grant injunctive or declaratory relief against congressional committees. When applied in conjunction with the well established judicial principle that federal courts will not interfere with pending criminal prosecutions, Younger v. Harris, 401 U.S. 37 (1971); Steffel v. Thompson, 415 U.S.

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[9] There is nothing unusual about the Department asserting the speech or debate clause on behalf of congressional defendants and it has done so in virtually hundreds of cases. See e.g., McSurely v. McClellan, supra. For a more complete list of cases in which the Department has done so see, e.g., Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 20, 22-27 (1976); and Report of the House Committee on the Judiciary Identifying Court Proceedings and Actions of Vital Interest to Congress, 97th Cong., 2d Sess. 208 (Comm. Print No. 14, 1981). Because the tax case is recent, we have attached the relevant portions of the Department's memorandum as Exhibit 5 as representative of the position which it has consistently taken.

452 (1974), it becomes apparent that "plaintiff" cannot invoke the court's equity jurisdiction under the present circumstances.

In Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972), plaintiff sought injunctive and declaratory relief against the Chairman and Members of the Permanent Subcommittee on Investigations with respect to a Senate resolution authorizing an investigation into the causes of civil disturbances and the issuance of a subpoena thereunder for records maintained in connection with a journal which he published. "The question pressed for decision is . . . whether plaintiff is entitled to an injunction or a declaratory judgment that would enable him to refuse to appear before the Subcommittee, free of the possibility of contempt citation, in response to the request for all records and documents . . .," 463 F.2d at 897, pertaining to the inquiry.

Although the court of appeals rejected the theory earlier expounded in Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960) that suits for declaratory relief against the legislature were "non-justiciable," Sanders v. McClellan, 463 F.2d at 897, it nevertheless determined that plaintiff was not entitled to declaratory relief for several compelling reasons equally applicable here.

The courts' analysis of the reason why declaratory relief is inappropriate is worth setting out in detail, for it draws into precise focus the way in which section 194 provides all the necessary protection for a witness.

> We first note the existence, apart from resort to our jurisdiction in equity, of an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation. A witness may address his claims to the Subcommittee, which may sustain objections. Were the Subcommittee to insist, however, upon some response beyond the witness' conception of his obligation, and he refused to comply, no punitive action could be taken against him unless the full Committee obtained from the Senate as a whole a citation of the witness for contempt, the citation had been referred to the United States Attorney, and an indictment returned or information filed. Should prosecution occur, the witness' claims could then be raised before the trial court. See Wilson v. United States, 125 U.S.App.D.C. 153, 369 F.2d 198 (1966). See generally C. Beck, Contempt of Congress (1959); R.L. Goldfarb, The Contempt Power (1963).

463 F.2d at 899.

It is both premature and presumptuous to seek exercise of this court's equitable powers to abruptly cut off the "orderly and approved means" by which the "plaintiff's" constitutional claims can be asserted and vindicated. [10]

The court of appeals then went on to address plaintiffs' claims, which again bear remarkable resemblance to those asserted by the "plaintiff." First, the Sanders plaintiff claimed the invalidity of the authorizing resolution, 463 F.2d at 900, just as the "plaintiff" attacks the resolution of contempt here, Complaint ¶28; next plaintiff argued that the resolution was "overbroad," as the "plaintiff" argues here, Complaint ¶39; and finally "Mr. Sanders also attacks Resolution 308 as applied to him, that is, he attacks the subpoena duces tecum as unconstitutional." id; see Complaint, Prayer for Relief, ¶D. The court firmly dispensed with these claims: "To rule with him would require us to ignore the regular procedure for testing witness' claims." Id.

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[10] The President's claim of executive privilege throughout the investigation and prosecution of Watergate offenses was litigated in the criminal context. Nixon v. Sirica, 487 F.2d 1 (D.C. Cir. 1973) (en banc) (grand jury subpoena); United States v. Nixon, 418 U.S. 683 (1974) (17(c) subpoena during criminal trial).

The decision went on to discuss the pre-Baker v. Carr cases, all of which were via appeal from contempt convictions, id., and the post Baker cases seeking to "bypass the regular procedure referred to, by invoking the equitable powers of the judiciary." Id. at 901. The court concluded that "in each of these cases finally decided by this court in which injunctive or declaratory relief has been sought with respect to an ongoing congressional investigation, the relief has been denied, if not always for the same reason." Id. (citations omitted).

Finally, the court dealt with Sanders' claim that protection of the significant constitutional interests in the confidentiality of news sources and the chilling effect on the news gathering process could not be vindicated in a criminal trial for contempt. The plaintiff relied for this claim on Dombrowski v. Pfister, 380 U.S. 479 (1965), where injunctive and declaratory relief were sought in federal court against prosecution by state officials alleged to be using a criminal statute in bad faith to deter plaintiff from exercising legitimate civil rights. The Supreme Court had reversed the lower court's decision to abstain to permit a possibly narrowing state construction of the statute, on the ground that defending in a criminal prosecution did not offer adequate remedy in view of clearly threatened enforcement of the statute. The Sanders court rejected this plea as well, relying on the doctrine of Younger v. Harris, 401 U.S. 37 (1971), that as a matter of comity between federal and state governments, federal courts will not enjoin a state prosecution under a state statute alleged "to be void" on its face.

> Our's is not a case of comity between federal and state sovereigns. It does present, however, the analogous problem of the relationship between two coordinate branches of the same government, and so is akin to the comity between Nation and State relied upon in Younger. The judiciary has the duty "of not lightly interfering with Congress' exercise of its legitimate powers' . . . While we have held in Part III of this opinion that deference due to Congress does not render the issue nonjusticiable, nevertheless, the court must not intervene prematurely or unnecessarily.

463 F.2d at 903 (emphasis added).

There simply is no reason to grant the relief requested for any subsequent prosecution will "afford[ ] . . . an opportunity to raise [Administrator Gorsuch's] constitutional claims." 401 U.S. at 49. 11/

11/ We will address later the alternative basis for declining to entertain this suit, which like the reasons for narrowly construing the ability of federal courts to enjoin state prosecutions, resides in "the function of federal courts in our constitutional plan." Id. at 52. In turn, the

Younger reaffirms that the "settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions" 401 U.S. at 53, even against a "statute which 'on its face' abridges First Amendment rights retain vitality." Id.

Younger and its progeny do nothing to erode the principle that injunctive or declaratory relief is unavailable against pending prosecutions.

Indeed Samuels v. MacKell, 401 U.S. 37 (1971) held that declaratory relief is foreclosed when a state prosecution is pending.

In addition, Steffel v. Thompson, 415 U.S. 452 (1974) holds that declaratory relief may be granted when no state prosecution is pending and "a federal plaintiff demonstrates a genuine threat of enforcement of a disputed criminal statute" regardless of whether the challenge is to the statute on its face or as applied. 415 U.S. at 475. The certification by the Speaker renders the criminal prosecution "pending" for purposes of Steffel, for 2 U.S.C. §194 imposes the nondiscretionary duty upon the United

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11/ [Continued from previous page]
function of federal courts to resolve actual "cases or controversies" rather than accord the courts "an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them," id., deprives the action of any real Article III substance.

States Attorney to at least present the matter to the grand jury.

The law of this circuit establishes that "[c]riminal proceedings [under 2 U.S.C. §192] are begun by a resolution of the full House or Senate, citing the witness for contempt." United States v. American Telephone & Telegraph, 551 F.2d 384, 393 n.16 (D.C. Cir. 1976). Therefore, since the criminal proceeding has "begun" declaratory relief under Steffel is not available.

The principles that courts of equity will neither enjoin, nor declare the rights of parties in, criminal prosecutions enunciated in the foregoing cases are aptly summarized in Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943):

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

The policy of refraining from interference in pending prosecutions, particularly those begun under 2 U.S.C. §194, is not only sound judicial policy but is wholly consistent with the legislative intent of Congress in enlisting "the aid of the Judiciary to enforce its will." Eastland, supra at 509 n.16.

The investigative power of the Congress has been, from the earliest days of the Republic, exercised to examine and review the administration of executive departments of the government. Landis, Constitutional Limitations on The Congressional Power of Investigation, 40 Harv.L.Rev. 153, 170-175 (1926) and examples cited therein, including 10 Annals of Cong. 786-87 (1800) (investigation of Secretary Wolcott's administration of treasury); 21 Annals of Congress 1606-07 (1810) (investigation of Brigadier General Wilkinson and allegations of complicity in foreign intrigue).

That the purpose of the criminal contempt statute, enacted in 1857, was to enlist the aid of the judiciary, is clear from the legislative history. One of the sponsors explained in detail the purposes and procedures implemented by the statute:

> The first section of the bill confers no summary power on any tribunal; it increases no power now existing in any committee, and confers no power to be exercised either by the committee or the House. It makes a mere substitution of a judicial proceeding for the ordinary proceeding by attachment by a parliamentary body. It substitutes a definite punishment for an indefinite punishment. It substitutes an efficient punishment for an inefficient punishment. It substitutes the quiet formality of judicial proceeding in lieu of the irregular proceedings which occurred in this House yesterday, in attempting to exercise such jurisdiction as is necessarily incident to any parliamentary investigation. It places in the court power to punish according to the gravity of the offense, and does not make it a question of time in relation to the beginning or the end of the session, whether the party shall be confined one day, one week, ten months, or two years, without any sort of reference to the merit or demerit of the party, and depending entirely on the accidental time of the duration of the

> Congress at which he may be called upon to testify. I presume, therefore, that it does not inflict any burden on the citizen; that it throws guards around him; that it causes punishment to be more equitably measured out according to the gravity of the offense, and makes it more sure than any punishment that can be inflicted by this House. In addition to the great security of the rights of the citizen, it removes him from the passions and excitement of the Hall, which may affect the duration of the punishment, and makes the question a matter of calm judicial consideration and reflection, to be passed upon by a jury of his countrymen, and not in this arena, where partisans may frequently, in political questions, carry into the measure of punishment their party hostilities. So much for the first section of the bill.

Cong. Globe, 34th Cong., 3d Sess. 427 (remarks of Rep. Davis).

The Congress fully intended and contemplated that the procedures prescribed by the statute would apply to executive officials and private persons alike:

> The bill proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of the House. . .

_Id_. at 429.

The appropriateness of utilizing the criminal contempt statute as a means of enforcing congressional subpoenas to executive officials was recognized and endorsed only recently by the Ervin Committee in the Senate Select Committee's Watergate investigation. Chief Counsel, Sam Dash, in explaining to Judge Sirica the reasons for taking the unusual step of instituting civil suit to enforce a congressional subpoena for the Watergate tapes, stated that "[o]rdinarily we would have subpoenaed an official subordinate to the President and then the proper route would have been either a recommendation for citation for contempt which we come [sic] the criminal route referring to the prosecutor or the extraordinary way of our common law powers to prosecute ourselves through the sergeant-at-arms." Transcript of Court Proceedings at 13, Senate Select Committee v. Nixon, supra, Senate Select Committee Legal Documents at 918.

Indeed, the Supreme Court has noted: "Congress, in enacting §192, specifically indicated that it relied upon the courts to apply the exacting standards of criminal jurisprudence to charges of contempt of Congress to assure that the congressional investigative power, when enforced by penal sanctions, would not be abused." Gojack v. United States, 384 U.S. 702, 707 (1966). See also Russell v. United States, 369 U.S. 749, 755 (1962).

The kinds of claims asserted by the "plaintiff" in the conplaint have previously been considered by the courts in reviewing prosecutions under the statute. For example, see McPhaul v. United States, 304 U.S. 372, 382 (1960) where the court resolved on appeal from a conviction under the statute a claim of overbreadth; and United States v. Tobin, 195 F.Supp. 588, 608-613 (D.D.C. 1961) where the court considered the witness' claim of executive privilege.

As we will demonstrate, each and every valid constitutional contention which can be advanced by the "plaintiff" may be adequately adjudicated in any ensuing criminal proceeding and the assertion to the contrary is unsupported by any showing that the interests of the Executive in avoiding "great and immediate" harm will be prejudiced by following the statutorily prescribed method under the criminal contempt statute.

The essence of the executive's pleas seems to be that it wishes to unilaterally substitute a civil review mechanism, the instant suit for injunctive and declaratory relief, for the procedure which has been enacted into statute. This attempt to erect law by executive fiat, substituting ad hoc civil review for the duly enacted statutory and judicially approved provisions, not only represents an impermissible usurpation of the legislative function but also ignores the extensive history of legislative and executive consideration of this very question and the proper exercise of legislative judgment that proceedings pursuant to the statute provide the necessary and proper safeguards for the witness while serving the legislatures need to obtain information. 12/

What emerges, then, from the legislative history of the statute, contemporary understanding of its reach, and

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12/ The criminal contempt statute is also the preferred way to proceed because it avoids interference with the legislature. "Finally, what is sought--government by injunction--is anathematic to the American judicial tradition. . ." United States v. City of Philadelphia, 644 F.2d 187, 203 (3d Cir. 1980). What was said there is equally true here: the Executive cannot chose a means which Congress has rejected because of "convenience and political considerations." Id. citing New York Times, Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring).

Supreme Court interpretation, is that the criminal prosecution under 2 U.S.C. §§192, 194 is preferred because it provides the witness, whether he or she is an executive official or private person, the full panoply of safeguards attendant to a criminal case. [13]

III. THE COURT LACKS JURISDICTION TO ENTERTAIN THE ACTION

The House of Representatives submits that the complaint is fatally defective in that there is no statutory basis for a suit by the Department of Justice, or the Executive against the Legislative Branch, or one of its houses, in the instant case the House of Representatives; that even if the statutes relied upon by the plaintiff confer a statutory grant of jurisdiction, the action does not satisfy the constitutional requirements for a "case or controversy" under Article III, §2 of the Constitution because neither the "United States" nor the Executive branch has standing, because neither has suffered any injury-in-fact traceable to the actions of the House of Representatives which is redressable by the courts; and in any event should the elements of standing be satisfied, the action is nevertheless premature and unripe for judicial review. Finally, there is no nonstatutory basis upon which the Executive can bring suit under any implied authority, which even if available, could not satisfy the Article III requisites for jurisdiction.

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[13] Congress has even applied the criminal contempt statute to its own employees for contumacious conduct before committees. Contempt of O. Robert Fordiani, H.R. Res. 743, 96th Cong., 2d Sess., 126 Cong. Rec. H6177 (daily ed. July 21, 1980).

In Senate Select Committee v. Nixon, 366 F.Supp. 51 (D.D.C. 1973) the President defended a suit by the former Watergate Committee chaired by then Senator Sam J. Ervin and on precisely such fundamental and threshold jurisdictional grounds obtained quick dismissal of the suit. As we will demonstrate below, the instant suit is even more seriously flawed from a jurisdictional standpoint and must be dismissed.

At the outset of the jurisdictional argument, the House of Representatives wishes to again protest the presumptuous assumption by the "plaintiff" of the sovereign's mantle "United States". The House of Representatives has raised the issue of the Executive's entitlement to denomination as "United States" in suits where it has refused to defend the constitutionality of statutes in favor of advancing the narrower parochial goals of the Executive. In no case is it clearer that the Executive has forfeited its right to proceed as the "United States" by refusing to enforce a valid law, and in bringing a suit as plaintiff to challenge its constitutionality directly against the Legislative branch.

A. There Is No Statutory Jurisdictional Basis For The Suit

It is axiomatic that in "a civil complaint . . . jurisdiction is a threshold issue . . . [and] is not automatic and cannot be presumed." Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F.Supp. 51, 55 (D.D.C. 1973) (Sirica, J.). Furthermore, "the presumption in each case is that a federal court lacks jurisdiction until it can be shown that a specific grant of jurisdiction applies." Id. Finally, the federal judiciary "may exercise only that judicial power provided by the Constitution by Article III and conferred by Congress." Id. And of course, jurisdiction may not be conferred by agreement or waiver by the parties. Mitchell v. Maurer, 293 U.S. 237, 244 (1934). Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

The Department relies first on the basic "federal question" statute, 28 U.S.C. §1331, to support the jurisdiction of the court. 14/

The legislative history of section 1331 is barren of any indication that Congress intended or understood the section to vest jurisdiction in the courts to decide inter-branch suits.

14/ In Senate Select Committee, supra, the Ervin Committee similarly attempted to ground jurisdiction for its civil suit to obtain Presidential tape recordings in section 1331. 366 F.Supp. at 59. The Court rejected section 1331 as a basis for jurisdiction because the Ervin Committee failed to satisfy the $10,000 amount in controversy requirement then contained in the statute, primarily because neither the "intrinsic value" of the tapes nor the legislator's rights and responsibilities could be quantified in a manner which would satisfy the $10,000 threshold. 366 F.Supp. at 59-61. Rather than pursue an appeal, the Committee sought and obtained a statute granting jurisdiction to sue. Senate Select Committee v. Nixon, 370 F.Supp. 521 (D.D.C. 1973).

The Watergate Committee, in its final report, had recommended "that Congress enact legislation giving the United States District Court for the District of Columbia jurisdiction to enforce congressional subpoenas issued to members of the executive branch, including the President." The Final Report of The Senate Select Committee on Presidential Campaign Activities, S.Rep.No. 981, 93d Cong., 2d Sess. 1084 (1974). The recommendation was never implemented by the Congress, and as shown below, it was specifically omitted from the title of the bill which ultimately provided procedures for the civil enforcement power granted to the Senate. In the Matter of the Application of the Senate Permanent Subcommittee on Investigations, (Cammisano) 655 F.2d 1232, 1238 n.28 (D.C. Cir. 1981) ("The Act [Ethics in Government] does not, however, include civil enforcement of subpoenas by the House of Representatives.") The issue of authorizing federal courts to hear civil enforcement cases was at the fore of congressional discussion immediately after Watergate and during enactment of the Office of Senate Counsel, Ethics in Government Act of 1978 §705, Pub.L.No. 95-521, 92 Stat. 1878, 2 U.S.C. §288(d) (Supp. III 1979) 28 U.S.C. §1364 and the suggestion that Congress would enact an authorization statute without comment is inconceivable. 15/

Nor could section 1331 be read to imply a cause of action. Where a statute does not clearly establish a civil cause of action, the Supreme Court has held that one will be inferred only after satisfaction of comprehensive standards. Cort v. Ash, 422 U.S. 66 (1967), Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). "Under these decisions the 'central inquiry' and the 'ultimate question' is congressional intent," United States v. City of Philadelphia, 644 F.2d 187, 191 (3d Cir. 1980), and the standard is no different for inferring a cause of action "in favor of the government than the standard applicable to private litigants." Id.

The Cort v. Ash criteria do not favor inferring a cause of action, because at least two of the criteria are absent. As articulated in Cort the critical inquiries are, first is the United States "one of the class for whose especial benefit the statute was enacted . . . [s]econd, is there any indication of legislative intent, explicit or implicit, either to create a remedy or deny one?" 422 U.S. at 78.

Of course, the "United States," assuming arguendo the entitlement of the Executive to clothe itself in the

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15/ Special Prosecutor Archibald Cox has written: "But resolving disputes between the President and Congress over the provision of evidence for the Congress is not part of, or incident to, any judicial business confided to the courts by the statutes that presently define their jurisdiction; and therefore the courts cannot now rule upon the effect of congressional subpoenas." Cox, The Role of the Supreme Court in American Government, 26-27 (Oxford Univ. Press 1976).

sovereign, is no part of a "class for whose especial benefit the statute was enacted," 16/ and there simply is no legislative intent explicit or implicit one way or another.

What does exist is 2 U.S.C. §§192 and 194 and the clear congressional intent to establish that as a mechanism to enforce its subpoena, repeatedly recognized by the Supreme Court as an appropriate invocation of judicial authority. Thus in Watkins v. United States, 354 U.S. 178, 207 (1957) the Court stated that "Congress has invoked the aid of the federal judicial system in protecting itself against contumacious conduct [and] [i]t has become customary to refer these matters to the United States Attorneys for prosecution under criminal law," and in Russell v. United States, 369 U.S. 749, 755 (1962) the Court stated that by "enacting the criminal statute under which these petitioners were convicted Congress invoked the aid of the federal judicial system in protecting itself against contumacious conduct."

16/ In United States v. City of Philadelphia, supra, the United States asserted a "duty" under two criminal statutes to sue to prevent violations of constitutional rights. The court of appeals rejected this "duty" theory, taking the Supreme Court's admonition in a predecessor case brought against the mayor and other city officials that such "amorphous propositions" could not support a cause of action. Rizzo v. Goode, 423 U.S. 362, 376 (1976). See also, Clark v. Valeo, 559 F.2d 642, 654 (D.C. Cir. 1977) (en banc) (Tamm, J., concurring) ("Not only does this argument [that the Government has a constitutional duty to take care that the laws are faithfully executed] assume a role for the executive as the 'protector of the Constitution,' but it also presupposes a decision on the merits of this suit"). And so the "duty" theory has been thoroughly discredited.

The "central inquiry" concerning congressional intent in these matters is answered in favor of the statutory means already in place and not in implying a civil remedy.

In United States v. City of Philadelphia, supra, the Attorney General argued that since the legislative history of the Reconstruction era Civil Rights Act did not reveal that Congress considered providing a civil remedy for the United States one could be implied in favor of the government from two criminal statutes. The court of appeals rejected this argument for reasons particularly relevant to the present case:

> the extensive congressional consideration of the problem of enforcement and the comprehensive legislative program that it developed simply foreclose the possibility that it implicitly created an additional remedy without ever mentioning its existence in either the statutes or the debates. There certainly is no evidence of congressional intent to create an additional remedy with the incredible breadth and scope of this one. The responsible answer . . . is that Congress never intended to grant a civil action to the Attorney General.

644 F.2d at 194-195.

Likewise, in the present circumstance, implying an additional remedy would turn congressional intent on its head.

While a few courts have on occasion, sua sponte, entreated the Congress to enact civil enforcement provisions, they have nevertheless recognized that the decision to do so is a legislative judgment, which must be statutorily authorized by Congress, not invented and manufactured by litigants and thrust upon the court.

"Although this question is not before the Court, it does feel that if contempt is, indeed, the only existing method [for resolving disputes between Congress and witnesses], Congress should consider creating a method of allowing these issues to be settled by declaratory judgment." United States v. Tobin, 195 F.Supp. 588, 617 (D.D.C. 1961). (emphasis added) On appeal, the court of appeals requested "that Congress will first give sympathetic consideration to Judge Youngdahl's eloquent plea." 306 F.2d 270, 276 (D.C. Cir. 1962)

Despite these judicial supplications, Congress has declined to do so.

In fact, when the Congress proposed to subject executive officials to civil enforcement actions to enforce congressional subpoenas the Department of Justice opposed the measure and in view of its opposition, executive officials were stricken from the reach of the civil enforcement statute. 28 U.S.C. §1364, enacted as Title V, Ethics in Government Act, supra. As originally introduced, Senator Ervin's Watergate Reform Act, S. 495, 94th Cong., 1st Sess. §101, (1975) included a mechanism for enforcement of congressional subpoenas against executive officials. During consideration of S.495 in the Senate Governmental Affairs Committee the Department of Justice opposed the provision, arguing instead that there should be one-time only statutes if the need ever arose:

What remains as the position of the Department is

> that a specially drawn statute for each specific situation would be preferable.

Watergate Reorganization and Reform Act of 1975: Hearings Before the Senate Comm. on Government Operations on S.495 and S2035, 94th Cong., 1st Sess., Part 2, 33 (1976) (testimony of Michael M. Uhlmann, Assistant Attorney General, Office of Legislative Affairs, Department of Justice).

The Department later explained that its opposition was constitutionally compelled because the provision represented an attempt by Congress "to exercise what is traditionally understood to be exclusively executive functions, namely, the litigation of cases in the courts." Id. at 34. See also, Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary, supra n.9 at 90-91 (1976) (Justice Department Statement on Constitutionality of S.2731 providing, inter alia, for civil enforcement mechanism.)

On the strength of these views, the final version of the bill did not contain any provision for civil enforcement against executive officials. Senator Abourezk, the chief sponsor of the civil enforcement provisions which ultimately became the Ethics In Government Act, Pub.L.No. 95-521, codified at 2 U.S.C. §§288 et seq. (Supp. III 1979), 28 U.S.C. §1364 (Supp. II 1978), explained the reason for deletion of the provision

> S.2569, S.4227, and S.495 also contained a provision authorizing Congress "to bring civil actions, without regard to the sum or value of the matter in controversy, in a court of the United States to require an officer or employee of the executive branch of the U.S. Government, or any agency or department thereof, to act in accordance with the Constitution and the laws of the United

> States . . . ." During the subcommittee hearings, the Department argued vigorously that bringing such suits would be unconstitutional in light of Buckley v. Valeo, 424 U.S. 1, 138 (1976) . . .. Due to this opposition to that section, it was deleted by the Senate Government Operations Committee when the bill was reported . . ..

123 Cong. Rec. S1913 (daily ed. Feb. 1, 1977) (statement of Sen. Abourezk).

The position of the Department during consideration of the bill creating the Senate Legal Counsel and vesting the courts with jurisdiction to enforce its subpoenas against private parties indicates its own conviction that the action brought against the House is constitutionally flawed. Coupled with the failure of Congress to follow the recommendations of the Ervin Committee to provide federal court jurisdiction to entertain enforcement suits, it is abundantly clear that Congress never intended to create an interbranch right of action under section 1331.

Section 1345, the other statutory basis alleged for "plaintiff's" suit, sheds further light on whether section 1331 provides jurisdiction of interbranch suits for it limits suits by the United States to those expressly authorized by law. Section 1345 provides

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress. (emphasis added).

In United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979), the court of appeals held that "the United

States may not bring suit to protect the constitutional rights of the mentally retarded without express statutory approval. . ." (emphasis added) And in United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977) the court found no explicit or implicit authority upon which the government could sue state officials responsible for the operation of a state hospital for the mentally retarded in alleged violation of the constitutional rights of patients. The court noted "while the United States points to numerous examples of federal legislation evidencing federal interest. . .it points to no statute which explicitly authorizes the bringing of this suit." 563 F.2d at 1124. Concluding that "interest in the generic sense, in the subject matter of the suit," id. at 1125, was insufficient with respect to "a question of authority," the court affirmed dismissal of the suit.

On its face, section 1345 is "merely a statutory expression of the Congress' constitutional power to define the jurisdiction of federal courts without which a federal court cannot entertain a suit regardless of how solidly a litigant establishes his standing." Clark v. Valeo, 559 F.2d 642, 657 (D.C. Cir. 1977) (en banc) (Tamm, J., concurring). It simply provides the district court with jurisdiction, provided of course, "the United has the capacity and standing to bring suit . . ." Id. (emphasis added) [17]

The House of Representatives respectfully submits that section 1345 provides no additional capacity to the "United States" to sue, or the court to hear such suit, unless another statute expressly authorizes it. The court of appeals for this Circuit recognized the obvious limits of section 1345 in suits between the branches and in United States v. American Tel. & Tel. Co., 551 F.2d 384, 389 (D.C. Cir. 1976) when it proclaimed that "[a] question arises whether suit is brought 'by the United States' within §1345 when the executive branch is seeking to enjoin the legislative branch." [18] It found alternatively that jurisdiction existed under section 1331 given the national security interests sought to be protected by the executive.

The A.T.&T. court's rendition of section 1331 as a jurisdictional basis is also inapposite because the Department did not sue a coordinate branch directly, but a private party to prevent compliance with a congressional subpoena, and the House subsequently intervened as a defendant in a pending suit.

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[17] We address the lack of standing in the next section, Part III B1, infra.

[18] See also, New York Times v. United States, 403 U.S. 713, 753-54 (1971) (Harlan, J., dissenting) (a question is posed whether the Attorney General is authorized to bring these suits in the name of the United States).

B. The Suit Does Not Present A Case Or Controversy Within The Meaning of Article III

1. Lack Of Standing

In the novel and unprecedented fashioning of a suit directly by the Executive against the Legislature, it is not enough to allege statutory jurisdiction, for as the court has recently reaffirmed,

> The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.

Valley Forge Christian College v. Americans United For Separation of Church and State, 102 S.Ct. 752, 757-758 (1982).

President Nixon's counsel argued that Article III did not provide for suits by one branch against another when the Ervin Committee sued for declaratory relief in connection with its subpoena to the President in Senate Select Committee v. Nixon, supra,

> The suggestion that the proper manner to resolve the heretofore unresolved question of executive privilege as it applies to Congress by way of a declaratory judgment is not novel . . .. The suggestion flies in the face of the role of the courts in our constitutional system. For this is, quite simply, a dispute between Congress and the President, and to use the words of Justice Douglas, ' federal courts do not sit as an ombudsman refereeing disputes between the other two branches.'

Brief of Richard M. Nixon In Opposition To Plaintiffs' Motion for Summary Judgment at 10, Senate Select Committee v. Nixon, 366 F.Supp. 51 (D.D.C. 1973) reprinted in Senate Select Committee Legal Documents, supra n.9 at 814.

The position of the House of Representatives in this case is that the action does not satisfy the requirements of standing, which emanate "ex proprio vigore" from Article III, Valley Forge Christian College, supra at 758 and accordingly the action must be dismissed. No part of the House's argument is based on the "political question" doctrine, but on the "bedrock" requirements imposed by Article III.

Foremost among the ex proprio vigore requirements of Article III is that a plaintiff have standing to sue. Because constitutionally required, standing is a "threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975) (emphasis added). The standing inquiry "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

The first inquiry is whether any statute has explicitly conferred standing on "the United States" to sue in this instance; and second, whether in the absence of a statute "the United States" may maintain a nonstatutory suit because it has suffered a judicially cognizable injury.

As to the first inquiry, we have already indicated that the two statutes relied upon by the Department do not authorize suit; as to the second inquiry, we submit that the "United States" as a whole has suffered no injury in-fact and therefore has no standing to sue. Moreover, a plaintiff must show an injury which is "direct" and both "real and immediate" not "conjectural" or "hypothetical." Golden v. Swickler, 394 U.S. 103, 109-110 (1969).

The complaint fails to allege any concrete injury in fact to the nation as a whole which has been recognized to provide standing to the "plaintiff" in the absence of any express statutory authority to sue.

The "United States" has not been injured in any "direct" and "immediate" way; nor will it be injured at all if the prosecution proceeds under 2 U.S.C. §194.

All the cases recognizing the nonstatutory authority of the Executive to bring suit are premised on injury to the proprietary or contractual interests of the government, e.g., Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818) (suit on bill of exchange); United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831) (suit for breach of contract); Cotton v. United States, 52 U.S. (11 How.) 229 (1850) (suit in trespass); or its right to protect the public. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). Whether acting to further a comprehensive legislative scheme in an area, United States v. Bell Telephone Co., 128 U.S. 315 (1888) (suit for recission of fraudulently procured patent); or to protect interstate commerce from obstruction or disruption, and thereby protect the general welfare, In Re Debs, 158 U.S. 564 (1895); or to protect against an injury to "national security," New York Times v. United States, 403 U.S. 713 (1971), United States v. American Tel. & Tel. Co., supra; there must be injury to the "United States, its government and its people" Clark v. Valeo, supra at 655 to confer standing. There is no comparable injury-in-fact to the nation as a whole or the people sufficient, arising from the claim that the President's obligation to ensure confidentiality of law enforcement files will be impaired, to confer standing on "the United States."

Like the situation in Clark v. Valeo, "[t]he only injury alleged by the Government here is a conflict of views between the Executive and Legislative branches of the federal government as to the constitutional prerogatives of the Executive." 559 F.2d at 654.

The three concurring judges in Clark v. Valeo, supra rejected as a basis for the standing of the United States every case cited by the Department of Justice.

A review of the major suits brought on an implied nonstatutory basis by the Executive reveals the utter lack of standing to pursue the present action.

In Re Debs, 158 U.S. 564 (1895) "is the cornerstone for modern judicial recognition of nonstatutory executive power to bring suit," Note, Nonstatutory Executive Authority To Bring Suit, 85 Harv.L.Rev. 1566, 1568 (1972) and yet as the concurring judges pointed out in Clark v. Valeo, 559 F.2d at 654, "the Debs court specifically noted that the duty on which the standing of the United States rested arose not simply from the constitutional grant of power to regulate commerce but from congressional action expressly assuming and implementing that power." Id. at 586, 599.

Injury in fact sufficient to provide standing was present with respect to other nonstatutory suits filed by the Executive to relieve burdens on interstate commerce: United States v. ICC, 337 U.S. 426 (1949) where the United States filed suit in district court to obtain relief from an order of the Interstate Commerce Commission imposing allegedly unlawful railroad rates on the United States as shipper; United States v. California, 332 U.S. 19, 22-23 (1947), where the United States sued to enjoin California from trespassing on offshore lands over which the United States claimed fee simple ownership; [19] and United States v. San Jacinto Tin Co., 125 U.S. 278 (1888), where the United States sued to set aside a land patent which was fraudulently procured and the injury to the loss of mineral rights and other property interests conferred adequate standing on the United States.

Two circuits have recently found lack of standing where the United States brought non-statutory suits to enjoin state officials from violating the constitutional rights of institutionalized persons. In United States v. Mattson, 600 F.2d 1295, 1300 (9th Cir. 1979), the Court of Appeals found lack of injury to the United States to bar such an action and in United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977), the court found that the government had no interest to warrant an implicit grant of authority. The court determined that in the absence of an "assertion of a property interest," id. at 1298 (like Dugan v. United States, supra; United States v. Tingey, supra or Cotton v. United States, supra), "interference with national security" id. 1298-99, (like United States v. New York Times, supra), or "a burden on interstate commerce" id. at 1299, (like In Re Debs, supra, or United States v. American Bell Telephone Co., supra, or United States v. Brand Jewelers, Inc., 318 F.Supp. 1293 (S.D.N.Y. 1970), no actual injury had been demonstrated.

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[19] As the concurring judges characterized the case, "the alleged infringement of property rights by California in that case was clearly an injury to the United States as a whole" Clark v. Valeo, 559 F.2d at 655.

The Mattson court concluded with reasoning particularly appropriate to this case:

> Any lesser standard than a showing of actual injury to those who assert standing would require a court to rule on important constitutional issues in the abstract, and allow a potential abuse of the judicial process. This could distort the role of the judiciary in its relationship to the executive and legislative branches. Schlesinger v. Reservists To Stop The War, 418 U.S. 208, 221, 94 S.Ct. 2925, 41 L.Ed. 2d 706 (1973).

600 F.2d at 1300.

In addition, in order to sustain standing, the injury of the "plaintiff" must be fairly traceable to the "putative illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). See also, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976) (plaintiff must show that the injury "fairly can be traced to the challenged action of the defendant") The "plaintiff's" complaint doesn't offer a clue about how the present legislative defendants are responsible for its injury, for it is not the legislative defendants who are responsible for proceeding under 2 U.S.C. §192.

To say that the legislators have caused injury in the present context would be to say that legislators cause the injury in every case in which a plaintiff challenges the constitutionality of a statute; that is obviously incorrect, for the legislators do not cause the application or enforcement of the law, executive branch officials do. Riegle v. Federal Open Market Committee, 656 F.2d at 879 n.6 ("when a plaintiff alleges injury by unconstitutional action pursuant to a statute, his proper defendants are those acting unconstitutionally under the law. . .and not the legislature which enacted the statute").

Finally, "plaintiff" fails to satisfy the third prong of the standing requirement that "the judicial relief requested will prevent or redress the claimed injury." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 74, 79 (1978). As demonstrated in Part II A, supra, because "plaintiff" seeks to restrain a legislative act, i.e., the act of certifying the contempt, judicial redress is precluded given the inability of the Courts to restrain legislative proceedings or actions. Eastland v. United States Servicemen's Fund, supra. Simply put, the "plaintiff's" claimed injury cannot be redressed by exercise of the court's remedial powers.

2. Lack of Ripeness

It is firmly established that federal courts may not render advisory opinions because Article III provides only for adjudication of actual "cases or controversies." "This is as true of declaratory judgments as any other field." United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947).

In 1793, the Supreme Court unanimously refused to grant the request of Secretary of State Jefferson, acting at the direction of President Washington, to construe treaties and laws of the United States arising out of wars of the French Revolution. The Court declined to answer these questions based on the separation of powers and the proper judicial function of deciding cases, not hypothetical abstractions. 3 Correspondence and Public Papers of John Jay 486-489 (New York: 1893) quoted in Muskrat v. United States, 219 U.S. 346, 351 (1911).

The "plaintiff" seeks nothing less than an advisory opinion, for the power "to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference a hypothetical is not enough." United Public Workers v. Mitchell, 330 U.S. at 90.

Under the formulation of the Complaint, anytime the "United States" or an executive or legislative official desired to have a judicial construction, by way of declaration or otherwise, of a statute before its application in a given case, they could simply present the matter to the federal courts for an answer. This would mean not only a deluge of advisory questions upon the courts, but an essential alteration in the functions of the courts and relationships between the branches. "The federal courts were simply not constitued as ombudsmen of the general welfare, "Valley Forge Christian College, supra at 766-67, and the courts should not be asked to hear countless pre-enforcement challenges to legislative acts, whether that be subpoenas, committee hearings or the passage of statutes.

IV. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Apart from jurisdictional defects, the Complaint is fatally flawed within the meaning of Civil Rule 12(b)(6). The Complaint, in short, fails "to state a claim upon which relief can be granted." Or, put differently, the "plaintiff" fails to allege a cause of action, i.e., that the "plaintiff" is a "member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." Davis v. Passman, 442 U.S. 228, 239-240 n.18 (1979).

That the "plaintiff" has no cause of action under the circumstances presented is apparent for several reasons.

First, there is nothing in the Constitution or laws of the United States which gives the sovereign United States of America any cause of action to resolve inter-branch disputes over the use of a privilege allegedly possessed by one of the coordinate branches.

Secondly, there is nothing in the Constitution or laws of the United States which purports to grant any cause of action to any executive officer to secure judicial recognition, prior to indictment or trial, that an alleged executive privilege insulates such officer from "criminal prosecution for contempt under 2 U.S.C. §194." Complaint ¶40. The assertion that Administrator Gorsuch "has the right not to be subject to criminal prosecution" is intolerable for no man or woman "in this country is so high that he is above the law. No officer of any law may set that law at defiance with impunity. All officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882).

It is clear that even Members of Congress, who have a textual privilege against being questioned for performance of their legislative acts, are subject to prosecution for acts defined as crimes by the laws of the United States. See, e.g., 18 U.S.C. §201 (federal bribery statute) and United States v. Brewster, supra. Even in a case where the Member seeks to vindicate his personal speech or debate privilege to prevent violations prospectively or to remedy abuses after they occur, his remedy is not to sue to enjoin prosecution or declare his rights, but to assert his rights incident to the criminal proceedings by way of motion to dismiss the indictment, Helstoski v. Meanor, 442 U.S. 500 (1979); to seek protective relief from impermissible grand jury questioning, Gravel v. United States, 408 U.S. 606 (1972), to quash subpoenas emanating from the grand jury, In Re Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978) or to seek inspection of the grand jury minutes. United States v. Williams, 644 F.2d 950, 951 (2d Cir. 1981).

These are the judicially accepted means with which to assert constitutional rights, not the invention of unknown causes of action.

Third, there is nothing in the Constitution or laws of the United States which purports to create any cause of action in any executive officer to secure judicial relief against the House of Representatives by barring it from serving "upon the U.S. Attorney a request for criminal prosecution under the provisions of 2 U.S.C. §194 or from taking any further action to enforce the outstanding subpoena with respect to such documents." Complaint ¶41. Recognizing such a cause of action would invite executive attempts to avoid those laws that incur executive displeasure, on grounds that some kind of constitutional defense might be available should an executive officer be prosecuted under such laws. Compare Louisville and Nashville R.R. v. Mottley, 211 U.S. 149 (1908); Skelly Oil Co. v. Phillips, 339 U.S. 667 (1950).

Fourth, there is nothing in the Constitution or laws of the United States which purports to confer on any potential defendant a cause of action to secure a judicial declaration that such potential defendant has a valid defense to the prosecution. Such a suit flies in the face of the historical doctrine that courts do not interfere with or enjoin criminal prosecution where the criminal action affords complete opportunity to present and resolve or legitimate defenses.

And finally there is nothing in the Constitution or laws of the United States which purports to confer on either the sovereign United States, the executive branch or any officer thereof any cause of action against the Congress of the United States, or either House thereof, for engaging in constitutionally lawful legislative action.

It has been the consistent opinion of the Attorney General that it does not lie within the province of an executive branch official to question the validity of a statute he is bound to apply, if it does not violate his personal constitutional rights.

As Attorney General Homer Cummings opined, a public officer entrusted with statutory duties cannot refuse to perform duties prescribed by law because he believes others may be injuriously affected and "'One administrative officer cannot attack the constitutionality of a statute because it may violate the constitutional rights of other administrative officers in order to avoid his own performance of a mandatory duty imposed upon him by that statute.'" 30 Op. Att'y Gen. 252, 254 (1935).

Accordingly, the "plaintiff" has utterly failed to state a cause of action under any provision of the Constitution or laws of the United States.

Conclusion

The House of Representatives submits that this unprecedented suit seeks to overthrow the precepts of jurisprudence established in the 200 year existence of the federal judiciary and which have governed legislative and judicial relations from the beginning of the Republic. The misguided attempt to restrain the operation of the legislative process and disrupt the judicially approved means of contesting congressional subpoenas violates the clear dictates of the Supreme Court. The "plaintiff" seeks, without jurisdictional basis, to usurp a legislative judgment to submit the matter to Article III in an "orderly and approved" manner and substitute instead the civil enforcement mechanism which the judicial, legislative and the executive branches have previously rejected.

All this to subvert and avoid application of an often invoked law of the United States which executive officials are duty bound to uphold for the purpose of delaying the expeditious resolution of the dispute so that Congress may proceed with a valid and vitally important inquiry.

Respectfully submitted,

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Dated: December 30, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,
Defendants.

Civil Action No. 82-3583
(Smith, J.)

ORDER

Upon consideration of the Motion of the House of Representatives to Dismiss and to Expedite Consideration thereof and of the opposition thereto, it is this ____ day of __________, 1983,

ORDERED, that the Motion is granted and it is further

ORDERED, that this action is dismissed with prejudice.

United States District Judge

PROCEEDINGS AGAINST ANN M. GORSUCH

Mr. HOWARD. Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

The SPEAKER pro tempore. The question is on the resolution.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

Mr. HOWARD. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The vote was taken by electronic device, and there were—yeas 259, nays 105, not voting 69, as follows:

[Roll No. 471]

YEAS—259

Addabbo
Akaka
Albosta
Anderson
Andrews
Annunzio
Anthony
Applegate
Aspin
AuCoin
Bailey (PA)
Barnard
Barnes
Bedell
Beilenson
Benjamin
Bereuter
Bethune
Bevill
Biaggi
Bingham
Boggs
Boland
Boner
Bonior
Bonker
Bouquard
Bowen
Breaux
Brinkley
Brodhead
Brooks
Burton, John
Byron
Chappell
Chisholm
Clay
Coelho
Coleman
Collins (IL)
Conable
Conte
Conyers
Courter
Coyne, William
Crane, Philip
Crockett
D'Amours
Daniel, Dan
Daschle
Davis
de la Garza
Deckard
Dellums
DeNardis
Dicks
Dingell
Dixon
Donnelly
Dorgan
Dowdy
Downey
Dwyer
Dyson
Early
Eckart
Edgar
Edwards (CA)
Edwards (OK)
English
Erdahl
Ertel
Evans (IA)
Evans (IN)
Fary
Fazio
Fenwick
Ferraro
Findley
Fish
Fithian
Florio
Foglietta
Foley
Ford (MI)
Ford (TN)
Fountain
Frenzel
Frost
Gaydos
Gejdenson
Gephardt
Gibbons
Gilman
Ginn
Glickman
Gonzalez
Goodling
Gore
Gradison
Gray
Green
Guarini
Gunderson
Hall (IN)
Hall (OH)
Hall, Ralph
Hall, Sam
Hamilton
Hance
Harkin
Hefner
Heftel
Hertel
Hightower
Hopkins
Howard
Hoyer
Hughes
Hutto
Hyde
Jeffords
Jones (OK)
Jones (TN)
Kastenmeier
Kazen
Kennelly
Kildee
Kogovsek
LaFalce
Leach
Leland
Levitas
Livingston
Long (LA)
Lowry (WA)
Luken
Markey
Marks
Martin (IL)
Martin (NY)
Martinez
Matsui
Mattox
Mavroules
Mazzoli
McCloskey
McCollum
McCurdy
McHugh
McKinney
Mica
Mikulski
Miller (CA)
Miller (OH)
Mineta
Minish
Mitchell (MD)
Mitchell (NY)
Moakley
Molinari
Mollohan
Montgomery
Moore
Mottl
Murphy
Murtha
Myers
Natcher
Neal
Nelligan
Nelson
Nowak
Oakar
Oberstar
Obey
Ottinger
Panetta
Parris
Patman
Patterson
Paul
Pease
Pepper
Perkins
Petri
Peyser
Pickle
Porter
Price
Pritchard
Rahall
Rangel
Ratchford
Regula
Reuss
Rinaldo
Rodino
Roe
Roemer
Rostenkowski
Roukema
Roybal
Russo
Sabo
Savage
Scheuer
Schneider
Schroeder
Schumer
Seiberling
Sensenbrenner
Shamansky
Shannon
Sharp
Shelby
Simon
Skelton
Smith (IA)
Smith (OR)
Snowe
Solarz
St Germain
Stark
Stenholm
Stokes
Stratton
Studds
Swift
Synar
Tauke
Tauzin
Traxler
Udall
Vento
Volkmer
Walgren
Washington
Watkins
Waxman
Weaver
Weber (MN)
Weiss
White
Whitley
Whittaker
Whitten
Williams (MT)
Wilson
Wirth
Wolpe
Wright
Wyden
Yates
Yatron
Young (FL)
Young (MO)
Zablocki
Zeferetti

NAYS—105

Atkinson
Bafalis
Bailey (MO)
Benedict
Bliley
Brown (CO)
Brown (OH)
Broyhill
Burton, Phillip
Butler
Carman
Carney
Chappie
Cheney
Clausen
Clinger
Collins (TX)
Corcoran
Coughlin
Coyne, James
Daniel, R. W.
Dannemeyer
Daub
Derwinski
Dickinson
Dornan
Dreier
Duncan
Dunn
Emerson
Emery
Erlenborn
Fiedler
Fields
Forsythe
Gingrich
Gramm
Gregg
Grisham
Hammerschmidt
Hansen (ID)
Hansen (UT)
Hartnett
Hendon
Hiler
Hillis
Hollenbeck
Hunter
Johnston
Kindness
Kramer
Lagomarsino
Latta
Lent
Loeffler
Lott
Lowery (CA)
Lujan
Lungren
Madigan
Marlenee
Marriott
Martin (NC)
McClory
McDade
McDonald
McEwen
McGrath
Michel
Moorhead
Morrison
Napier
Oxley
Pashayan
Quillen
Ritter
Roberts (KS)
Roberts (SD)
Robinson
Rogers
Roth
Rudd
Sawyer
Shaw
Shumway
Siljander
Skeen
Smith (AL)
Smith (NE)
Smith (NJ)
Solomon
Spence
Stangeland
Staton
Stump
Taylor
Trible
Walker
Wampler
Weber (OH)
Whitehurst
Winn
Wolf
Wortley
Wylie

NOT VOTING—69

Alexander
Archer
Ashbrook
Badham
Beard
Blanchard
Bolling
Broomfield
Brown (CA)
Burgener
Campbell
Coats
Craig
Crane, Daniel
Derrick
Dougherty
Dymally
Edwards (AL)
Evans (DE)
Evans (GA)
Fascell
Flippo
Fowler
Frank
Fuqua
Garcia
Goldwater
Hagedorn
Hatcher
Hawkins
Heckler
Holland
Holt
Horton
Hubbard
Huckaby
Ireland
Jacobs
Jeffries
Jenkins
Jones (NC)
Kemp
Lantos
Leath
LeBoutillier
Lee
Lehman
Lewis
Long (MD)
Lundine
Moffett
Nichols
O'Brien
Pursell
Railsback
Rhodes
Rose
Rosenthal
Rousselot
Santini
Schulze
Shuster
Smith (PA)
Snyder
Stanton
Thomas
Vander Jagt
Williams (OH)
Young (AK)

□ 2200

The Clerk announced the following pairs:

On this vote:

Mr. Fuqua for, with Mr. Craig against.

Mr. Derrick for, with Mr. Badham against.

Mr. Flippo for, with Mr. Burgener against.

Mr. Williams of Ohio for, with Mr. Jeffries against.

Mr. RALPH M. HALL changed his vote from "nay" to "yea."

So the resolution was agreed to.

A motion to reconsider was laid on the table.

The result of the vote was announced as above recorded.

GENERAL LEAVE

Mr. LEVITAS. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the resolution just agreed to.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Georgia?

There was no objection.

TWO FIGHTER PILOTS IN A DOGFIGHT

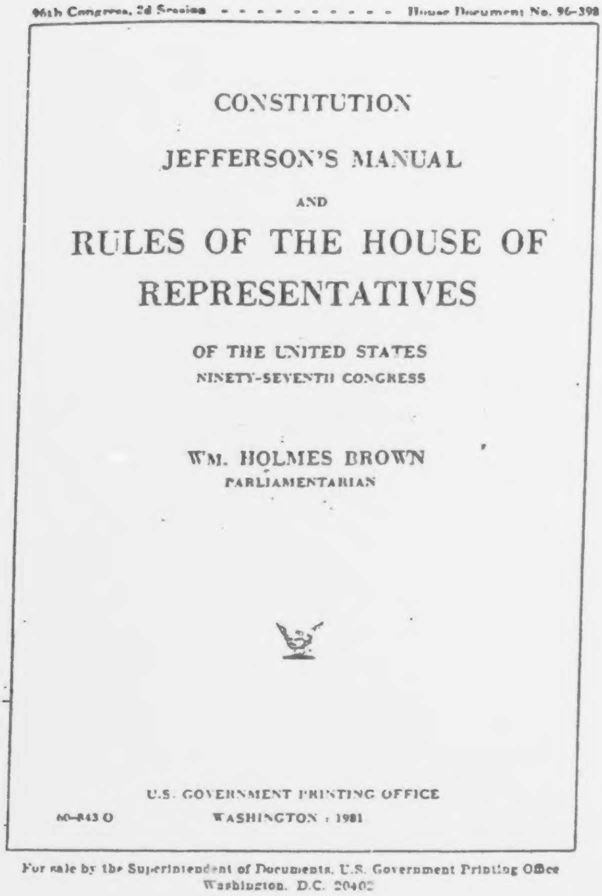
(Mr. DORNAN of California asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. DORNAN of California. Mr. Speaker, last week during debate on the Defense appropriations bill, the gentleman from Iowa (Mr. Harkin) offered an amendment regarding the cutoff of funds to the CIA for the purpose of assisting any individual or group in carrying out military activities in or against the Sandinista Government of Nicaragua. The text of the amendment offered can be located in the Congressional Record of December 8 on Page H9148.

During the debate I rose in opposition to the amendment. Mr. Speaker, as you well know, often times in the heat of debate, Members say things which later, after contemplation and due consideration for the conduct of reasoned debate, one might wish had never been said. This is the situation I find myself in with regard to a small portion of an otherwise stimulating exchange of opinions.

The day after the debate my friend, Tom Harkin—and I call him my friend even though we have quite different views on a broad range of issues—came to see me. Tom and I have traveled together not only to mainland China but to other countries, and let me just say that he has always conducted himself and presented himself in a manner that represents well our country and the best interests of our country. Tom and I have something else in common besides a burning desire to see things firsthand, up close and draw our own conclusions. IWT I call it, "I was there." We have both been fighter pilots and I know Tom shares my love and enthusiasm for aviation and the need for the United States to continue our lead in aviation throughout the world. This is one area in which we certainly agree. Even though we have different views on many issues, I have always found Tom to be reasonable and considerate of the views of others with whom he disagrees. So the day after the Nicaragua debate, Tom came to see me and brought to my attention the written words in the Record of what I had said the evening before. (Congressional Record, Dec. 8, 1982, on Page H9155 and continue through H9156.)

He asked that I reread those words and consider the impact of those



96th Congress, 2d Session - - - - - - - - - - - House Document No. 96-398

CONSTITUTION

JEFFERSON'S MANUAL

AND

RULES OF THE HOUSE OF REPRESENTATIVES

OF THE UNITED STATES
NINETY-SEVENTH CONGRESS

WM. HOLMES BROWN
PARLIAMENTARIAN

U.S. GOVERNMENT PRINTING OFFICE
60-843 O WASHINGTON : 1981

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Washington, D.C. 20402

Member to vote after the call on the plea that he had refrained because of misunderstanding as to a pair (V, 6080, 6081). Discussion of the origin of the practice of pairing in the House and Senate (VIII, 3076). On questions requiring a two-thirds majority Members are paired two in the affirmative against one in the negative (VIII, 3088). (For Speaker Clark's interpretation of the rule and practice of the House of Representatives as to pairs see VIII, 3089.)

§ 660a. Voting.

3. (a) A Member may not authorize any other individual to cast his vote or record his presence in the House or Committee of the Whole.

(b) No individual other than a Member may cast a vote or record a Member's presence in the House or Committee of the Whole.

(c) A Member may not cast a vote for any other Member or record another Member's presence in the House or Committee of the Whole.

Clause 3 was added in the 97th Congress (H. Res. 5, Jan. 5, 1981, p. ——). The Committee on Standards of Official Conduct recommended this addition to the Rules in its May 15, 1980, report (H. Rept. 96-991) on voting anomalies which had occurred in the House.

RULE IX.

QUESTIONS OF PRIVILEGE.

§ 661. Definition and precedence of questions of privilege.

Questions of privilege shall be, first those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members, individually, in their representative capacity only; and shall have precedence of all other questions, except motions to adjourn.

This rule was adopted in 1880 (III, 2521). It merely put in form of definition what had been long established in the practice of the House but what the House had hitherto been unwilling to define (II, 1603).

that satisfactory under these difficult circumstances?

Mr. PHILLIP BURTON. Once again the gentleman from California finds, as is not so unique in my parliamentary experience, the minority side has a lot more judgment than the punitive majority side and I will yield, not because of the Chair's request, but because of our distinguished gentleman from Pennsylvania's suggestion.

So I would ask this be put over until the first order of business tomorrow.

The SPEAKER pro tempore. I thank the gentleman.

Mr. WALKER. Mr. Speaker, I thank the gentleman and I withdraw my reservation of objection.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. The Chair desires to announce that pursuant to House Resolution 632, agreed to on December 16, 1982, the Speaker did on December 17, 1982, make certification to the U.S. district attorney for the District of Columbia as required by House Resolution 632, of the failure and refusal of Ann M. Gorsuch, as Administrator, U.S. Environmental Protection Agency, to furnish certain documents to the Committee on Public Works and Transportation.

GENERAL LEAVE

Mr. WALKER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks and to include therein extraneous material on the subject of the special order today by the gentleman from Texas, (Mr. Archer).

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

□ 0110

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. Collins) is recognized for 45 minutes.

[Mr. COLLINS of Texas addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

A TRIBUTE TO JIM COLLINS

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. Archer) is recognized for 60 minutes.

● Mr. ARCHER. Mr. Speaker, I would like to take this opportunity to salute my good friend, Jim Collins, for his 15 years of distinguished service to the residents of the Third District of Texas in the U.S. House of Representatives.

When I scheduled this special order honoring Jim, I thought it would be highly appropriate to salute him on his last day in the Congress. However, since the Members of the other body don't seem to be cooperating in this effort, it looks as though Jim will just have to stick it out a few more days. Knowing how much he has enjoyed his 15 years here, I don't think he will mind putting up with us all a little while longer.

Jim Collins is more than just a colleague to me—I count him as a very great friend, and I will always be grateful to him for his counsel and support during the years I have been privileged to serve with him. He cares passionately about our country, and treasures the traditional values upon which our great Nation was founded. These values have guided his work in this body, and Jim has never been afraid to voice and vote his convictions—even in the face of great adversity.

American taxpayers have had great reason to be grateful for Jim's service here. He has been one of their staunchest champions in the Congress, and has always fought to protect the rights and freedom many of us have come to take for granted. Jim is a man of honor and great integrity, and I will miss his presence among us very much.

I would like to close by saying that the fine new Representative for the Third District of Texas, Steve Bartlett, will have some mighty tall Texas size boots to fill. Jim, my friend, it has been an honor and a pleasure to serve with you.●

● Mr. RODINO. Mr. Speaker, I want to take this opportunity to honor a dedicated public servant and distinguished Member of this House who will not be returning next year. Ever since James Collins first came to Congress in 1969, he has dignified this House by his concern for people and his dedication to principle.

I have often found myself on the opposite side of issues from my friend from Texas, but I have never doubted the sincerity of his convictions or his sensitivity toward the people of his district. A man of integrity and wit, James Collins has been a conscientious statesman for his State and his country.

I am grateful for his friendship and I with him all the best in the future.●

● Mr. BROOKS. Mr. Speaker, I know the people of Texas' Third Congressional District in Dallas are proud of the record Congressman Jim Collins has established since entering Congress in 1968. During his 15 years as a Member of the U.S. House of Representatives, the people of Dallas have always known they have a friend here in Washington with whom they could work on many projects of vital importance to the city of Dallas and the State of Texas. He has been a hardworking, capable member of the Texas legislative delegation and he demonstrated time and again a spirit of independence and determination to pursue goals important to his constituency and to his party.

While we have not always agreed on every issue confronting our country, those of us who value his independent perspective will miss the reasoned arguments that he has brought to our deliberations as a legislative body.

We will miss his presence when the 98th Congress convenes in January and I want to wish Jim Collins and his lovely wife, Dee, the very best that the future has to offer.●

● Mr. LEATH of Texas. Mr. Speaker, a few years ago, the dean of our Texas delegation, Jack Brooks, was quoted as saying something like this: If a bill was up to reinvent the wheel, Jim Collins would vote "no." Jim has been so unafraid to voice opposition, even when opposition was not the politically safe move to make, I am surprised he did not rise in opposition to this special order in his honer. But, he did not, so he is just going to have to sit there and listen to us sing his praises.

If we were allowed to sing in the Chamber of the House, quite a few of us would raise our voices and serenade Jim with good Texas music. But we cannot sing here. Instead, I will go by the rules and just take a moment to thank Jim for his many kindnesses and courtesies and especially for the excellent representation he has given the fine people in the Third District.

We all know that Jim Collins has never avoided a disagreement and is totally committed to speaking his mind. And we have learned from him that, in the long run, this is best. Jim is always accessible, open to discussion, and available to share his time and thoughts. The Third District has been the beneficiary of caring, attentive representation, and the Congress has also profited by the association. We will all miss Jim Collins and he has our best wishes for happiness and success as he returns to private life. Serving with Jim has been a pleasure, His friendship has been a blessing.●

● Mr. SAM B. HALL, JR. Mr. Speaker, Jim Collins has achieved much in life, and even by Texas standards, he is a huge success. But one of his great accomplishments is one that he had nothing to do with; it was his birth in Hallsville, Tex. Not only is Hallsville my ancestral home, but it is located in the First Congressional District of Texas. So whether Jim likes it or not, I still consider him a constituent. Now that he has decided to return to Texas he is entitled to contact his Congressman on the critical issues of our times. Knowing Jim Collins as we all do, I have no doubt that he will be just as active in this regard as he has been on the House floor for the past 15 years.

It is hard to imagine this body without Jim Collins, and it is going to take some getting used to when we return in January. He has been my friend for a long time, and for the past 6½ years here in the House we have established a rapport and mutual respect of the most endearing and lasting quality imaginable.

Department of Justice

DEPARTMENT OF JUSTICE STATEMENT

LAST NIGHT, IMMEDIATELY AFTER THE CONTEMPT CITATION WAS VOTED BY THE HOUSE AGAINST EPA ADMINISTRATOR GORSUCH, THE JUSTICE DEPARTMENT FILED A CIVIL SUIT SEEKING TO BLOCK THAT CONTEMPT ACTION.

THE JUSTICE DEPARTMENT CHARGED IN THE SUIT THAT THE SUBPOENA ISSUED BY THE HOUSE FOR EPA DOCUMENTS WAS UNCONSTITUTIONAL. WE ASKED THE U.S. DISTRICT COURT TO ENJOIN ANY EFFORT TO PURSUE CRIMINAL ACTION AGAINST GORSUCH.

THE SUIT NOTED THAT EPA WAS WITHHOLDING ONLY ABOUT 74 DOCUMENTS, LESS THAN ONE PERCENT OF WHAT WAS SUBPOENAED. AND THAT WAS BEING WITHHELD AT THE DIRECTION OF THE PRESIDENT, ON THE ADVICE OF THE ATTORNEY GENERAL.

WE FURTHER POINTED OUT THAT IN RESPONSE TO THE SUBPOENA EPA HAD PRODUCED OR MADE AVAILABLE FOR COPYING ABOUT 787,000 PAGES OF DOCUMENTS, AT A PROJECTED COST OF ABOUT $223,000. THIS AMOUNTED TO MORE THAN 15,000 PERSONNEL HOURS.

AFTER CAREFUL REVIEW, PRESIDENT REAGAN FOUND THAT THE WITHHELD DOCUMENTS ARE FROM OPEN LAW ENFORCEMENT FILES THAT ARE SENSITIVE MEMORANDA OR NOTES BY EPA ATTORNEYS AND INVESTIGATORS REFLECTING ENFORCEMENT STRATEGY, LISTS OF POTENTIAL WITNESSES, SETTLEMENT CONSIDERATIONS AND SIMILAR MATERIALS. THE DISCLOSURE OF SUCH DOCUMENTS MIGHT ADVERSELY AFFECT A PENDING ENFORCEMENT ACTION, OR THE RIGHTS OF INDIVIDUALS. SUCH DOCUMENTS SHOULD NOT BE MADE AVAILABLE TO CONGRESS OR TO THE PUBLIC EXCEPT IN EXTRAORDINARY CIRCUMSTANCES. IT IS A MATTER OF PROTECTING THE INTEGRITY OF THE LAW ENFORCEMENT PROGRAM.

(more)

WE REGRET THE HOUSE ACTION. SINCE THE MATTER APPARENTLY CANNOT BE SETTLED BY NEGOTIATION, IT BELONGS IN THE COURT. WE BELIEVE THE CRIMINAL CONTEMPT PROCEDURE CHOSEN BY THE HOUSE IS NOT AN APPROPRIATE ONE, AND WE SEEK TO HAVE THE MATTER DECIDED IN A CIVIL SUIT WHERE THE ISSUES CAN BE EXAMINED WITH CALM DELIBERATION.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RON PAUL, Plaintiff, v. THE UNITED STATES OF AMERICA THE UNITED STATES HOUSE OF REPRESENTATIVES, THE UNITED STATES SENATE, THOMAS P. O'NEILL, JR., SPEAKER OF THE HOUSE OF REPRESENTATIVES, THE HON. PRESIDENT OF THE SENATE, GEORGE HERBERT WALKER BUSH, WILLIAM F. HILDENBRAND, SECRETARY OF THE SENATE, EDMUND L. HENSHAW, JR., CLERK OF THE HOUSE OF REPRESENTATIVES, Defendants.	Civil Action No. 82-2352

MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF JUSTICIABILITY AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED SUBMITTED BY SENATE DEFENDANTS AND THE UNITED STATES

Defendants The United States of America, The United States Senate, George H. W. Bush, President of the Senate, and William F. Hildenbrand, Secretary of the Senate, by their undersigned counsel, hereby move, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of plaintiff's complaint as the Court lacks subject matter jurisdiction over the question presented and the complaint fails to state a claim upon which relief can be granted.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LAWRENCE A.G. MOLONEY

concerns have been directly addresed by Congress, the Court should exercise its equitable discretion and dismiss plaintiffs' actions.

III. Congressional Defendants Are Immune From These Suits Under the Speech Or Debate Clause.

The plaintiffs have named as defendants, officers and officials of the House and Senate, as well as the institutions themselves,[*/] although each are clearly immune from suit under the speech or debate clause of the Constitution. U.S. Const., Art. I, § 6. That clause provides that: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."[**/]

The speech or debate clause "serves the . . . function of reinforcing the separation of powers so deliberately established by the Founders."" United States v. Johnson, 383 U.S. 169, 178 (1966). "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975), and to secure for the legislative Branch freedom from executive and judicial encroachment. Gravel v. United States, 408 U.S. 606, 617 (1972); Tenny v. Brandhove, 341 U.S. 367, 372 (1951). The clause protects the institutional interests of the Congress; "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process . . . ." United States v. Brewster, 408 U.S. 501, 507 (1972).

[*/] In the Moore and Paul suits, congressional defendants include: the Speaker and Clerk of the House of Representatives, the President and Secretary of the Senate, and the institutions of the House and the Senate.

[**/] Plaintiffs apparently name congressional defendants on the theory that passage of the bill by the two Houses, and presentation to the President, would be unlawful. They did not seek temporary relief, however, and the Act was approved by the President on September 3, 1982. As we note, infra, there is at this point no relief which can be obtained from the Congressional defendants. For this additional reason, plaintiffs have failed to state a claim upon which relief can be granted.

Once it is determined that the challenged actions of congressional defendants fall within a "legitimate legislative sphere," the speech or debate clause is an absolute bar to judicial interference or inquiry. Eastland v. United States Servicemen's Fund, supra. Protection provided by the clause protects against intrusion in either criminal or civil proceedings [Id. at 503] and shields congressional defendants not only from the consequences of litigation, but from the burden of defending themselves as well. Davis v. Passman, 442 U.S. 228, (1979); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

The "consideration and passage or rejection of proposed legislation" is at the core of the legitimate legislative activity protected by the clause [Gravel v. United States, supra at 625], and there can be no doubt that the congressional defendants are protected under the immunity created by the speech or debate clause. The conduct complained of in the complaint, i.e., the method by which the Tax Equity and Fiscal Responsibility Act of 1982 was enacted, including the amendment of a bill by the Senate, the tabling of a proposed resolution by the House, and the signing of the bill by the Speaker of the House and the President of the Senate, is by any definition "legitimate legislative activity" protected by the speech or debate clause. Thus, judicial inquiry into the conduct of Speaker of the House O'Neill or President of the Senate Bush is absolutely prohibited. Similarly, plaintiffs' complaint that the Clerk of the House and the Secretary of the Senate will certify the Act is certainly conduct related to the functioning of Congress itself, and thus within the protection of the clause. Eastland v. United States Servicemen's Fund, supra at 507. Finally, to the extent that plaintiffs' allegations are somehow directed to the House and Senate as institutions, for passing the bill, the immunity is applicable in that it is institutional independence which is served by the clause. Accordingly, the complaints must be dismissed with respect to all congressional defendants.

Benjamin J. Guthrie
Clerk

W. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

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RECEIVED
JAN 18 1983

January 17, 1983

Honorable James J. Howard
Chairman
Committee on Public Works and Transportation
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515

REC'D JAN 31 1983
Subcommittee on Investigations
and Oversight
Committee on Public Works
and Transportation

Dear Mr. Chairman:

I am writing to inform you of the status of United States of America et al. v. The House of Representatives of the United States et al., No. 82-3583, a suit commenced by the Department of Justice following the citation of Anne M. Gorsuch for contempt of Congress on December 16, 1982.

On January 10, 1983, the Department responded to the motion to dismiss which we filed on your behalf on December 30, 1982 and at the same time the Department moved for summary judgment in its favor on the claim of executive privilege. On January 11, 1983, we wrote to Judge Smith requesting that he set our motion to dismiss for hearing to determine the jurisdictional issues raised by our motion to dismiss and, in effect, defer consideration of the claims of the Executive on the merits (copy enclosed). On January 12, 1983, the Civil Division of the Department of Justice opposed, by letter, our request and suggested that the Court hear both motions sometime after we respond to their motion for summary judgment (copy enclosed).

On Friday, January 14, 1983 the District Court issued an order setting only the House's motion to dismiss for hearing on February 1 at 10:00 A.M. The Court apparently agreed that threshold jurisdictional issues be determined before proceeding to any other matters.

Because some press accounts characterize the Judge's order as a "significant tactical advantage" for the House, see, e.g., Balt. Sun, Jan. 15, 1983 at A3, col.3., I hasten

Benjamin J. Guthrie
Clerk

to add that the Judge's determination to adopt the procedure we have suggested should in no way be construed necessarily as agreement with our position on the substance of our position, although it does mean that he at least views the jurisdictional issue as capable of potentially ending the case.

I will keep you apprised of further developments in this case.

Sincerely,

Stan Brand
Stanley M. Brand
General Counsel to the Clerk

Enclosures

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 3 1983

JAMES F. DAVEY, Clerk

UNITED STATES OF AMERICA,
and
ANNE M. GORSUCH,

Plaintiffs,

v.

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES; THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE ELLIOTT J. LEVITAS, CHAIRMAN OF THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE THOMAS P. O'NEILL, SPEAKER OF THE HOUSE OF REPRESENTATIVES; EDMUND L. HENSHAW, JR., THE CLERK OF THE HOUSE OF REPRESENTATIVES; JACK RUSS, SERGEANT AT ARMS OF THE HOUSE OF REPRESENTATIVES; JAMES T. MOLLOY, THE DOORKEEPER OF THE HOUSE OF REPRESENTATIVES.

Defendants.

Civil Action No. 82-3583

MEMORANDUM

The United States of America and Anne M. Gorsuch, in her official capacity as Administrator of the Environmental Protection Agency (EPA), bring this action under the Declaratory Judgment Act, 28 U.S.C. §2201. Plaintiffs ask the Court to declare that Administrator Gorsuch acted lawfully in refusing to release certain documents to a congressional subcommittee. Defendants in the action are the House of Representatives of the United States; the Committee on Public Works and Transportation; The Honorable James J. Howard, Chairman of the Committee on Public Works and Transportation; The Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; The Honorable Elliott J. Levitas, Chairman of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; The Honorable Thomas P. O'Neill, Speaker of the House of Representatives; Edmund L. Henshaw, Jr., Clerk of the House of Representatives; Jack Russ, Sergeant at Arms of the House of Representatives; and James T. Molloy, Doorkeeper of the House of Representatives. The individual defendants are sued only in their official capacities. The case is now before the Court on defendants' motion to dismiss.

The essential facts are undisputed. On November 22, 1982, a subpoena was served upon Anne Gorsuch by the Subcommittee on Investigations and Oversight (the Subcommittee) of the Committee on Public Works and Transportation (the Committee). The subpoena required Administrator Gorsuch to appear before the Subcommittee on December 2, 1982, and to produce at that time the following documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation and Liability Act of 1980."

On November 30, 1982, President Reagan sent a Memorandum to

Administrator Gorsuch instructing her to withhold from the Subcommittee any documents from open law enforcement files assembled as part of the Executive Branch's efforts to enforce the Comprehensive Environmental Response, Compensation and Liability Act of 1980. On December 2, 1982, the return date of the subpoena, Administrator Gorsuch appeared before the Subcommittee. She advised the Subcommittee that the EPA had begun to gather for production all documents responsive to the subpoena, but ". . . sensitive documents found in open law enforcement files will not be made available to the Subcommittee." 149 Cong. Rec. H10037. The Committee passed a Resolution reporting the matter to the full House of Representatives on December 10, 1982. The full House cited Administrator Gorsuch for contempt of Congress on December 16, 1982. The initial complaint in this case was filed on the same day, one day before the contempt resolution was certified to the United States Attorney for the District of Columbia for presentment to the grand jury. To date, the United States Attorney has not presented the contempt citation to the grand jury for its consideration.

Section 192 of Title 2 of the United States Code provides that a subpoenaed witness who refuses "to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress", shall be guilty of a misdemeanor "punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." Once an individual has been found in contempt by either House of Congress, a contempt order is presented to the President of the Senate or the Speaker of the House of Representatives for certification. 2 U.S.C. §194. The President or Speaker in turn delivers the contempt citation to the appropriate United States Attorney. The United States Attorney is then required to bring the matter before the grand jury. Id.

The Executive Branch, through the Justice Department, has chosen an alternate route, however, in bringing this civil action against the House of Representatives and individual members of the Legislative Branch. Plaintiffs ask the Court to resolve the controversy by deciding whether Administrator Gorsuch acted lawfully in withholding certain documents under a claim of executive privilege.

Defendants raise several challenges to the propriety of plaintiffs' cause of action. Included among defendants' grounds for dismissal are lack of subject matter jurisdiction, lack of standing, and the absence of a "case or controversy" as required by Article III, §2 of the United States Constitution. In addition, defendants claim that they are immune from suit under the Speech and Debate Clause, Article I, §6, cl. 1. Plaintiffs have addressed and opposed each of these threshold challenges.

The Legislative and Executive Branches of the United States Government are embroiled in a dispute concerning the scope of the congressional investigatory power. If these two co-equal branches maintain their present adversarial positions, the Judicial Branch will be required to resolve the dispute by determining the validity of the Administrator's claim of executive privilege. Plaintiffs request the Court to provide immediate answers, in this civil action, to the constitutional questions which fuel this controversy. Defendants, however, have indicated a preference for established criminal procedures in their motion to dismiss this case. Assuming there are no jurisdictional bars to this suit, therefore, the Court must initially determine whether to resolve the constitutional controversy in the context of a civil action, or defer to established statutory procedures for deciding challenges to congressional contempt citations.

The statutory provisions concerning penalties for contempt of Congress, 2 U.S.C. §192 and §194, constitute "an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation." Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972). Under these provisions, constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution. See Barenblatt v. United States, 360 U.S. 109 (1959); Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971); United States v. Tobin, 306 F.2d 270, 276 (D.C. Cir. 1962). Courts have been extremely reluctant to interfere with the statutory scheme by considering cases brought by recalcitrant witnesses seeking declaratory or injunctive relief. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Ansara v. Eastland, 442 F.2d at 754. Although the Court of Appeals for this Circuit has entertained one civil action seeking to block compulsory legislative process, that action was brought by the Executive Branch to prevent a private party from complying with a congressional subpoena. See United States v. American Telephone and Telegraph Company, 551 F.2d 384 (D.C. Cir. 1976). Significantly, therefore, in that case the Executive Branch was not able to raise its claim of executive privilege as a defense to criminal contempt proceedings.

Courts have a duty to avoid unnecessarily deciding constitutional issues. United States v. Rumely, 345 U.S. 41, 45-46 (1952). When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. See United States v. American Telephone and Telegraph, 551 F.2d at 393-395. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution. See id. Since the controversy which has led to United States v. House of Representatives clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary.

The gravamen of plaintiffs' complaint is that executive privilege is a valid defense to congressional demands for sensitive law enforcement information from the EPA. Plaintiffs have, thus, raised this executive privilege defense as the basis for affirmative relief. Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. See, e.g., Ansara v. Eastland, 441 F.2d at 753-754. The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties. The Court, therefore, finds that to entertain this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act, 28 U.S.C. §2201. See Hanes Corp. v. Millard, 531 F.2d 585, 591 (D.C. Cir. 1976). In light of this determination, the Court will not address the additional grounds for dismissal raised by defendants.

Accordingly, defendants' motion to dismiss is granted.

An appropriate Order follows.

Jno Lewis Smith Jr.
United States District Judge

Dated: February 3, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 3 1983

JAMES F. DAVEY, Clerk

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

THE HOUSE OF REPRESENTATIVES
OF THE UNITED STATES, et al.,

Defendants.

Civil Action No. 82-3583

ORDER

Upon consideration of defendants' motion to dismiss this action, plaintiffs' opposition, the memoranda filed by the parties, oral arguments of counsel and the entire record, it is by the Court this 3rd day of February, 1983

ORDERED that defendants' motion to dismiss is granted and this action is dismissed.

Jno Lewis Smith Jr.
United States District Judge